



Human Security and Human Rights under International Law:

Reinforcing Protection in the Context of Structural Vulnerability

Dorothy Estrada-Tanck

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Department of Law

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Examining Board

Prof. Martin Scheinin, European University Institute (Supervisor)
Prof. Ruth Rubio-Marin, European University Institute
Prof. Christine Chinkin, London School of Economics and Political Science
Judge Antônio Augusto CançadoTrindade, International Court of Justice

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Summary:

Human security has been qualified as “the emerging paradigm for understanding global vulnerabilities”. Articulated by UN and regional bodies over the last twenty years, its person-centred axis of *freedom from fear, from want and to live in dignity* and its *protection* and *empowerment* strategies, suggest communicating bridges with human rights law. However, this connection has seldom been explored at a deeper level that transcends human rights as discourse or token. This thesis analyses whether human security may provide tools for an expansive and integrated legal interpretation of international human rights, state and non-state obligations in the context of structural vulnerability; and whether a gendered and human rights-based approach can more accurately define the scope of human security and the types of violence and deprivation it considers. Thus, on the basis of an initial interdisciplinary research, this thesis maps and critically evaluates the expressions of human security/human rights interaction in international law, particularly human rights law, with a cross-cutting emphasis on socio-economic vulnerabilities as authentic security concerns. Then it explores the practical applications of the human security/human rights symbiosis in the legal analysis of two thematic cores: 1) violence against women and girls, and 2) undocumented migrants and other non-citizens; throughout the UN, and the Inter-American, European, and African systems of human rights. In the last chapter, the thesis extrapolates this evidence to reveal and propose ways in which human security is and can be relevant to human rights law, and how human rights standards and indicators can deliver a needed more precise, normatively grounded and operational conception of human security. These identified ‘*interpretative synergies*’ offer promise for shifting the boundaries of international human rights law: in constructing integrative approaches to fill legal gaps, better preventing and addressing protectively collective threats, and creating an ‘enabling environment’ to fulfil *all* human rights, especially, for those not only confronting isolated moments of risk or individual human rights violations, but rather conditions of structural vulnerability affecting their everyday lives.

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To Jorge, the love of my life
And to our new life out of love

To all the anonymous women and undocumented migrants
who commit, and often risk, their lives for a more secure and just world

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1. Preface

This thesis focuses on the following two basic questions: Whether human security may provide tools for an expansive and integrated interpretation of international human rights and their correlative state and non-state obligations, especially in the context of structural vulnerability; and whether a human rights-based approach, and in particular, a gendered and human rights-based approach, may contribute to a more accurate definition of the scope of human security and the types of violence and deprivation it takes into account.

The human security notion has been defended arguing that the broad spectrum of perils that people confront in this global era cannot be understood nor fully tackled by traditional public policies and concepts of national, military and state security. Almost twenty years after its inception in its contemporary form, advanced by the United Nations Security Council (UNSC) and the United Nations Secretary General (UNSG) in 1992, fully articulated by the United Nations Development Program (UNDP) in 1993 and 1994, and further developed by the Commission on Human Security (CHS) in its report of 2003, human security has been used in myriad ways. It has been addressed as a parallel concern for human development, as a foreign policy tool, as a guide in crisis management and peace-keeping operations, as an instrument for state-building projects, particularly in post-conflict societies, as a guarantee for the enjoyment of human rights, as part of a wide understanding of the right to peace, as a motor for change in matters of global governance, as a light to render certain threats more visible –those of a socio-economic nature, violence against women and girls and risks faced by non-citizens among them-, and not less so as a catalyst for a broader understanding of security that covers individual and group security, but also collective security as contemplated by international law. The recent conceptualization of human security on the basis of *freedom from fear*, *freedom from want* and *freedom to live in dignity*, has operated both in a horizontal way as to the subject matter of security –the elements and conditions considered threats-, and in a vertical way as to who should be the object of security –the actors worthy of protection: persons instead of states.

Indeed, human security has been qualified as “the emerging paradigm for understanding global vulnerabilities”.¹ The literature and academic scholarship, the positions of international and regional organizations, inter-governmental activity, and civil society initiatives approaching human security are vast and all-encompassing. It has been studied as a notion to enhance understanding of the UNSC’s competences in maintaining international peace and security. It has influenced numerous international and regional policy positions. It has been dealt with through the disciplines of development studies, political science, international relations, critical security studies and international law, all of which are explored in the first part of this thesis in an attempt to provide a more complete picture of the profile of the human security reflection.

¹ Interview to Sadako Ogata, former UN High Commissioner for Refugees (1991-2000), co-chair of the Commission for Human Security (2001-2003) and President of the Japan International Cooperation Agency (2003-2012), in *Council of Foreign Relations*, March 18, 2008, available at <http://www.cfr.org/search/?Ntt=human+security&submit.x=0&submit.y=0>

In the international legal arena, as a general outlook, human security advocates present various success stories of initiatives promoted as part of the human security epitome, of expressions that specifically endorse the notion or of instruments that reflect its core values: at the UN level, the negotiation and adoption of the 1997 Mine Ban Treaty and the 1998 Rome Statute for the International Criminal Court. Regarding regional settings, the Association of Southeast Asian Nations (ASEAN) and the League of Arab States (LAS) have considered human security within their goals and actions. In the hemisphere of the Americas, human security is reflected through instruments and institutional reforms embodying legal practice of the Organization of American States (OAS); and at the sub-regional level, the 1995 Framework Treaty on Democratic Security in Central America explicitly contains human security concerns. In the African Union context, human security has been envisaged as the basis for state protective action towards people in vulnerable conditions and specifically conceived as well as a possible trigger for state intervention. In the European landscape, it is argued to have influenced the strategy of the European Union (EU) and the Organization for Security and Co-operation in Europe (OSCE) on Small Arms and Light Weapons. In this last area, human security also displayed its effects on the adoption of the 1997 Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials and the 2006 Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials.

Different elements of human security have been analysed on their own footing and expressed in guidelines with normative content or in full legal documents, such as environmental security, personal security, social security or food security. Turning to the specific field of international human rights law, the central focus of this thesis, human rights such as the right to personal security, social security or security in tenure, were reflected in some of the different types of human security identified by the UNDP in 1994. Other human security components have since then been further articulated in the language of human rights. Recent examples may be found in the right to food security or the right to peace for women, in the 2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa; or the connection of human security to specific human rights, as elaborated in the 2009 *Report on Citizen Security and Human Rights* by the Inter-American Commission of Human Rights (IACoHR).

Against this ample background, the UN General Assembly (UNGA) considered human security as a 'right' in the 2005 *World Summit Outcome* and deriving from that, discussed a 'common understanding' of human security, later picked up in the *UN Secretary General's Second Report on Human Security*. The report was presented to the UNGA last April 2012, debated by this body in June 2012 and generally agreed upon by it in a resolution of October 2012. The 'common understanding' adopted by the UNGA defines human security as an *approach* to assist Member States in identifying and addressing *widespread* and *cross-cutting* challenges to the survival, livelihood and dignity of their people and considers that human security includes the *right* of people to live in freedom and dignity, free from poverty and despair, stressing that all individuals, in particular *vulnerable people*, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential.²

² UN General Assembly, A/Res/66/290 "Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome", 25 October 2012, para. 3,a).

This thesis defends the idea that *all* human rights –civil, political, economic, social and cultural– should be considered within the human security conception, as confirmed by the UNGA’s most recent position, and only differentiated or prioritized according to identifiable and identified levels of risk and vulnerability on a context-specific basis. In this respect, the 2012 UNSG’s Report and the UNGA’s stand adopt a stronger legal human rights’ basis to ground the idea of human security than that contained in the 1994 UNDP and the 2003 CHS reports.

However, at this point it seems clear that at the UN level, the notion of human security will formally remain as a policy framework or at most, viewed from the perspective of positive law, as a semi-legal figure, promoting the inclusion of central elements of human security in legal instruments, even if not mentioning the term as such, or building upon existing international legal obligations -mainly in the field of human rights law and refugee law, and to some extent in humanitarian law and criminal law- in order to promote coordination and partnerships to address widespread threats in a coherent manner and build resilience to confront them. Of course, nothing prevents the possibility of human security acting as an orienting notion to complement and inform legal interpretation at the UN level, particularly in the actions of human rights bodies and mechanisms. On the other hand, proof indicates that at the regional levels human security does indeed play a legal role in various settings.

The main focus of this thesis is not to defend the (absolute) legal character of human security or even the advantage of this option in all scenarios, but rather to map and evaluate critically its current articulation and standing in public international law, including some of its legal expressions at the regional levels, particularly in international human rights law. Inversely, some ways in which human rights law, standards and indicators could contribute to better define the scope of human security are also identified. The links between human security and human rights are made visible through the element of *risk or vulnerability*, analysed as well in its legal dimension, with a particular and cross-cutting emphasis throughout the whole thesis on the vulnerabilities severely affecting economic, social and cultural rights and facilitated by conditions of extreme material deprivation and social marginalization.

Indeed, often even “among professionals working on world affairs, to speak of international law and human rights is often to evoke thoughts of countering terrorism, justifying humanitarian intervention or enforcing international criminal justice. What remains overlooked is that the machinery of international law when it comes to human rights applies, in multifarious and significant ways, to matters of world poverty, inequality and development...they are (also) matters of ‘international law and human rights’ ”.³

Situations of material deprivation and socio-economic inequality, however, do not only affect economic, social and cultural rights; they are often also determined along gender, age, disability, and ethnic lines. Rather, poverty, social exclusion and marginalisation have many faces, they cut through the whole set of human rights and they are deeply related to the rights to equality and non-discrimination and to the right of access to justice, as will be spelled out in this thesis. And at this junction human security comes forward as a concept that may better capture the breadth and width of this relationship and transcend the traditional human rights divide of civil and political/economic, social and cultural rights. Through emphasizing the interrelated risk factors and vulnerabilities affecting *all* human rights, the lack of enjoyment of political, cultural, social,

³ Salomon, Margot E., “The future of human rights”, in *Global Policy*, Volume 3, Issue 4, November 2012, p. 455.

civil and economic rights and the structural obstacles to their full realisation become security concerns for the state. The human security perspective holds potential as well for addressing other actors contributing to these risk-producing barriers.

Hilary Charlesworth, Christine Chinkin and Shelley Wright years ago invited us to consider women, half of the world's population that had been silenced, marginalised or rendered invisible by the structures of international law. They proposed to do it through studying traditional areas and concepts of international law from a perspective that regards gender as important, challenging the existing patterns of domination and subordination it allows, and questioning existing norms and devising new agendas for theory. An invitation is drawn to rethink long-learned gendered legal notions and through cooperative strategies reimagine possibilities of change through an "altered humanized international law".⁴ Indeed, international law may be limiting but also transformative.

In this sense, the thesis approaches international law critically, while at the same time offering hope as to the possibilities of extending its boundaries through the human security notion. In contributing to identifying 'categories of vulnerability', the human security perspective provides for criteria to trigger and reinforce the state's (or other actors') human rights obligations to prevent, address and remedy violations. At the same time, the research signals limitations in the all-encompassing concept of human security, highlighting that to make it actually operational and valuable it is necessary for it to be tied to existing normative frameworks, languages and indicators, such as those developed in human rights law. It thus builds on existing criticism towards the notion, but does not abandon the human security proposal, rather seeking to revisit it and complement it on the basis of the various insights it has contributed to strengthen or advance in three central identified points: a) its person-centred approach, b) its emphasis on intra-state violence and broader understandings of direct and indirect violence; and c) its underlining of socio-economic vulnerabilities as authentic security concerns.

The twin pillars of *protection* and *empowerment* embodied with the same force in the human security notion are both relevant not only from a conceptual, but also from a strategic perspective. In its axis of *protection*, the 'top-down' approach, it reinforces the role of the state as the primary duty-bearer in the protection of persons in conditions of vulnerability, but leaves open space to also engage other actors in a position of power to commit to enabling human security. By emphasizing 'bottom-up' construction through its element of *empowerment*, it echoes feminist discourse and opens up this second pillar as a wide-ranging condition necessary for realizing human security for vulnerable, silenced or destitute persons and groups more generally. Indeed, the pillar of empowerment also drives us to build horizontal partnerships based on commonalities and create cooperative networks among persons and organizations working on similar issues, some of which have been essential for the legal advancement of women's rights, for instance.⁵

Thus, the present text wishes to contribute to this discussion shifting the boundaries of international law to address in deeper and more efficient ways the structural and interrelated challenges for human rights enjoyment for all. It does so through looking more distinctly at the reflection of human security principles in judicial and quasi-judicial decisions, through the human

⁴ See by these authors "Feminist Approaches to International Law", in *The American Journal of International Law*, Vol. 85, No. 4, October 1991, pp. 618, 632, 643 and 645.

⁵ See Merry, Sally Engle, *Human Rights and Gender Violence: Translating International Law into Local Justice*, University of Chicago Press, Chicago, 2010. Note also her idea of 'vernacularization' of international law as the process of its appropriation by local actors and practices.

rights bodies at the UN level as well as the European, Inter-American and African systems of human rights. At these three regional levels, as well as their human rights' systems, human security does indeed seem to be embedded in different degrees in the historical traditions influencing understandings of security in each of such regional contexts, thus revealing a strong grounding to relate it to human rights and further advance the legal implications of such linkage.

One of the flaws of human security often signalled is the lack of accurate criteria for defining the threshold to be met in order to consider an issue a risk situation. The thesis, in addressing such concern, proposes ways in which human rights law may contribute to better defining the precise scope of human security. More importantly, the thesis aims at using this knowledge to reveal and propose ways in which human security is and can be relevant to the law of human rights, and how human rights can inform and deliver a more precise and operational conception of human security. These identified *interpretative synergies* may work together towards enhanced protection of the rights of people in their daily reality, in particular, those who do not only confront isolated moments of risk or human rights violations, but rather those in conditions of structural vulnerability, specifically women and girls suffering or at risk of violence and undocumented migrants and other non-citizens.

Indeed, gender and legal status relating to entry into or residence in a given state, both continue to constitute risk factors increasing the possibility for women and girls, and for undocumented migrants, of experiencing human rights violations. The international legal human rights framework applicable to violence against women and to undocumented migrants and their implementation, present gaps which translate into serious lack of protection. Thus, both topics present legal challenges in terms of bringing to life and making effective the human rights of the people covered by such norms. At the factual level, violence against women is still wide-spread and pervasive and apart from constituting a form of discrimination and a human rights violation in itself, it is also an obstacle for the enjoyment of other human rights. Concerning the theme of undocumented migrants, the human security quest for a new paradigm that adequately responds in a coordinated way to situations affecting people and transcending national borders, seems to fall directly in place with the transnational nature and the vulnerable condition deriving from undocumented migration. Undocumented migrants, whether moving across or within national frontiers, because of their status of legal irregularity, are at times placed in a species of 'legal limbo' where their rights are purportedly undefined, they often live in a climate of fear and they confront constant threats or actual violations of their universally recognized rights.

The two themes, violence against women and girls and human rights of undocumented migrants connect to developed and developing countries, to liberal democracies and authoritarian regimes, to the context of peace or armed conflict, in different degrees and intensities, but with the common denominator of representing structural vulnerabilities worldwide. Some of the definitions and standards developed by human rights law may contribute to better characterizing these threats as genuine human security concerns. On the other hand, the human security proposal of *freedom from fear, freedom from want and freedom to live in dignity* seems to hold promise in adding value to identifying and addressing such collective vulnerabilities through offering an integrative approach to fill the relevant legal gaps and fulfil the human rights of affected women and girls, and undocumented migrants and other non-citizens in their everyday lives.

Before moving to the content of the thesis, some words should be spared for the academic and

personal motivation of this work. I am aware of the different theoretical positions regarding international law, in particular those fields connected to human rights. Without attempting to accurately and deeply depict such positions or to deal with legal or political theory at length, given it would exceed the scope of this thesis, I would like to address an introductory reflection on some of those accounts as permeating many aspects considered in this text, and touch upon how I relate to them through this work.

To my understanding, we could broadly frame some of the main theoretical approaches to international human rights law, on the one hand, into those that view it in overall terms and even within the expressions of a plural world, as a normative system reflecting universal values, recognizing individual entitlements vis-à-vis the State as opposed to traditional international law State-to-State obligations, and thus, a useful tool to contribute to an emancipatory project and deliver the cosmopolitan promise to all persons; ultimately, as an instrument for hope for persons and groups placed in conditions of conflict, violence, poverty, discrimination, marginalization, vulnerability, insecurity and disenfranchisement.⁶

On the other hand, we find positions that question this view of international law, that highlight its colonialist and imperialist origins,⁷ and that, in different degrees, consider particularly international human rights as part of the problem and not the solution to the grave structural world challenges and socio-economic inequalities and the current need to build a new ‘global governance regime’. Under this reasoning, their individualist architecture and the conditioning of their protection to State-based performance tied to national politics, leave international human rights law and practice as ill-equipped and inadequate to meaningfully address such global tasks.⁸

International legal argumentation has also been deemed critically as a circular self-justifying system: every valid doctrinal argument seems capable of being opposed with an equally valid counterargument from within the system itself, thus not being able to produce any overarching and generally accepted solution unless the proponent seeks for sources outside the system. However, since according to this account, international law asserts its distinction from ‘politics’ and ‘morality’ falsely purporting objectivity as a discipline and as an attribute profiling the professional identity of the lawyers who practice it, then it is virtually impossible for it to openly

⁶ See for instance Cassese, Antonio, *International Law*, Oxford, Oxford University Press, second edition, 2005, p. 45; and Teitel, Ruti G., *Humanity's Law*, Oxford University Press, 2011, as referred to within this text.

⁷ See Koskeniemmi, Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Hersch Lauterpacht Memorial Lectures, Cambridge University Press, UK, 2001.

⁸ See as possibly the most representative Kennedy, David W., "The International Human Rights Movement: Part of the Problem?", in *Harvard Human Rights Journal*, Vol. 15, 2002, pp. 101-126 and by the same author "The International Human Rights Regime: Still Part of the Problem?", in Dickinson, Rob, Elena Katselli, Colin Murray and Ole W. Pedersen (editors), *Examining Critical Perspectives on Human Rights*, Cambridge University Press, 2013, pp. 2-34. In this last article, Kennedy points to the mismatch between a human rights edifice built on the basis of national politics to the current global economy and global society. Indeed, he brilliantly and convincingly brings light to the many global structural challenges such as climate change and extreme socio-economic inequality, that human rights has been unable to face effectively and significantly. The ethical and political pitfalls related to international human rights practice and the sense of ‘self-righteousness’ embedded in the contemporary human rights movement is signaled as well, especially when viewed as the professional field of technical specialization (a part of) it has turned into over the last 30 years. In this respect the diagnosis seems right in point and some of those critiques are shared in this thesis. On the other hand, he envisions no hope for human rights as a foundation or as a tool in the twenty-first century system of global governance: “politics has moved on and human rights is no longer the way forward. It focuses too longingly on the perfection of politics already past its prime. Like constitutional orders before it, a new *global governance regime* will be imagined and built through collective hope, struggle, and disappointment”, p. 34. Emphasis added.

recognize its contradictions and escape such circle of argumentation -for doing so would mean to reach out to those ‘outside’ subjective fields and consequently not be authentically ‘legal’; a flaw that is attributed to the theoretical foundations of modern international law in the liberal project which was committed to legal formality and identified itself as apolitical and ahistorical.⁹

Other critical approaches to international law have viewed it as an excluding regime which has left out the voices of many, quite notably of developing nations and of half of the world’s population as feminism has emphasized, and was signalled above,¹⁰ a critique that could also be applicable in different instances regarding other groups, such as indigenous peoples, ethnic, linguistic, religious or national minorities, and discriminated or socio-economically marginalised groups more generally.¹¹

From the International Law Commission’s positions on the fragmentation of international law that place human rights law as a special regime;¹² to those more integrationist which grant it the role of a sub-discipline of public international law and offer more unifying accounts of human rights’ legal interpretation;¹³ or give evidence of the links of such interpretation with ethical values or concepts such as human dignity;¹⁴ international human rights law has ultimately been characterized as the ‘last utopia’ of the twentieth century, posed as an absolute ideal arrival point for society and politics but actually historically contingent to the limited and biased circumstances of its constructors.¹⁵

Against the background of these multiple accounts, some critical studies of international law may view it as a disintegrated phenomenon that often produces and reproduces many of the existing inequalities and the international regulatory and institutional settings that facilitate them and contribute to their perpetuation.¹⁶ While this thesis is not directly concerned with analysing human security-human rights convergences and synergies from a theoretical perspective, the text does

⁹ For the full proposals of this position, see Koskeniemi, Martti, *From Apology to Utopia: The Structure of International Legal Argument*, (Reissue with New Epilogue), Cambridge University Press, Cambridge and New York, 2006. Koskeniemi has argued in his work and in different fora that the sense of an “objectively” existing world community co-natural to international law is based on a “subjective” feeling about being one with humanity. For an argumentation of the origins specifically of international human rights in the liberal venture, see Charvet, John and Elisa Kaczynska-Nay, *The Liberal Project and Human Rights: The Theory and Practice of a New World Order*, Cambridge University Press, New York, 2008.

¹⁰ See Charlesworth, Hilary, Christine Chinkin and Shelley Wright, *Feminist Approaches to International Law*, *op. cit.*, at pp. 616-621.

¹¹ Apart from developments involving a more inclusive stance by the international legal framework as related to these groups, note an interesting and fortunate fact as well: the most recent translation of the Universal Declaration of Human Rights was made to *huasteco*, one of the more than 60 indigenous languages spoken in Mexico; see www.ohchr.org

¹² See UN General Assembly, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission, Finalized by Martti Koskeniemi, A/CN.4/L.682, 13 April 2006.

¹³ For a position contrary to the apparent fragmentation of international law, see Toufayan, Mark, “Human Rights Treaty Interpretation: A Postmodern Account of its Claim to ‘Speciality’ ”, Working Paper Number 2, 2005, Center for Human Rights and Global Justice, NYU School of Law, New York, 2005.

¹⁴ McCrudden, Christopher, “Human Dignity and Judicial Interpretation of Human Rights”, in *The European Journal of International Law*, Vol. 19, no. 4, pp. 655-724.

¹⁵ See Moyn, Samuel, *The Last Utopia: Human Rights in History*, Harvard University Press, Cambridge MA, 2010.

¹⁶ See for instance this position in the preface by David Kennedy in Beneyto, José María and David Kennedy (editors), *New Approaches to International Law. The European and the American Experiences*, T.M.C. Asser Press, Springer, 2013, where he considers that the current international legal system would need to be tailored to address new structural questions of global ‘political economy’ that as of today are left virtually untouched, pp. xiii and xiv.

reflect some of the deep-rooted problems signalled by these critical categories of thought and builds on some of the accounts they offer. Indeed, such outlooks also evidence the constant need of re-visiting the dialogue between our conceptions of ‘justice’ and ‘the good’ and the legal constructions we have fabricated around them,¹⁷ to defend significant advancements but at the same time not take them as a given or as a static lifeless phenomenon. We have not reached “the end of history”, certainly not in the current state of world affairs, as illustrated throughout this text, and living out the human experience in history indicates we probably (and desirably) never will. Critical accounts remind us then of the relentless call for a closer conversation between political theory, human rights law and social experiences of (in)justice. At the same time, I do not fully agree with the diagnosis some of these critical perspectives present and consequently with the resulting outcome of utter disappointment with the current system. The thesis is critical of international (human rights) law, and places hope in it as well.

Certainly there are several transnational phenomena that are not resolved under a State-based legal logic or in the realm of national politics. To my mind, though, international law is not to be understood fully as a synonym of ‘global governance’, a series of rules for regulating and almost mechanically controlling processes, or a combination of administrative and public structures guaranteeing certain political stability in the international order, with little concern for the outcomes of such processes, the effects of these structures, or the values and interests behind them. True, in facing global challenges international law contains elements of interaction, coordination and governance at a worldwide level. But to overemphasize this aspect weakens principled approaches to law and overall disregards any form of agency or empowerment, any bottom-up approach that involves participatory construction, articulation or application of (international) law, particularly international human rights law. Apart from the theoretical shortcomings I would see in such a position, as revealed in the ideas spelled out in this thesis, I have had the opportunity to witness daily practical examples of the empowering potential of international human rights law and, therefore, I do not share the view that there are no proposals to be made or there is no room for creative thinking that may provoke the collaborative construction of solutions to the signalled structural problems of international law that undoubtedly exist.

Advances grounded in legal history, legal pluralism, social and global justice models, the law and rights in context, and feminist approaches to international law as infused throughout the thesis have thus been an illuminating and liberating discovery, providing some of the conceptual foundations necessary for this work and offering me the words to match many of my thoughts and experiences. Reading feminist authors and the call they formulate to re-think traditional narratives of law and the legal practice and offer new ones -equally valid, equally legal- less detached and more involved, less covered by purported objectivity and neutrality and more committed and compassionate towards those in need, less concerned with technicality and more relational, honest and humane, and through such understanding of the law, possibly more just: this is actually what prompted me to write these personally contextualized paragraphs.

Let me then situate myself with respect to these issues through the lens of a personal and professional experience derived from the work I had the opportunity of carrying out at the

¹⁷ See for instance the discussion of value pluralism and human rights, as well as the defense of one of the strands of the liberal project, namely, that grounded in the seventeenth century Hobbesian idea of a *modus vivendi* of toleration towards diversity, as the only promising component of liberalism to be rescued and to survive in the face of contemporary challenges of moral philosophy, in Gray, John, *Two Faces of Liberalism*, The New Press, New York, 2000, pp. 105-140.

Mexican Ministry of Foreign Affairs, the UN Office of the High Commissioner for Human Rights and mainly in the Mexico City Commission of Human Rights, a constitutionally autonomous institution (a certain model of expanded ombudsman) dealing with individual cases of human rights violations, as well as general programs for the promotion, protection and fulfilment of all human rights in an immensely complex city of twenty million persons. I do not attempt to place myself as embodying any sort of paradigmatic experience in the human rights social and legal movement or its effects at the domestic level. Through my legal work in these institutions, though, I had the fortune of dealing with cases which allowed me to meet and learn from a variety of individual, social, economic and political actors. I would like to bring a few to the fore as the intellectual and personal origins for the interest in this work. They all illustrate the interrelated crosspoints evidenced and argued in this thesis: the individual with the collective, the background stage with the distinct actors, and the immediately visible with the underlying. Although lived out as seemingly isolated single moments, they were experienced in the setting of daily work and are only a representative photograph of an ever-evolving reality.

Work related to indigenous peoples and to persons with disabilities gave me the chance of deepening my views on the need of intercultural and adaptable understandings of human rights and the richness of this joint inclusive construction of bridges, by contrast to monist, unilateral or excessively formalistic or positivistic conceptions of human rights. Through my work in the Mexico City Commission of Human Rights, I had the opportunity of meeting the parents related to a case involving police negligence which resulted in the unwilling but foreseeable death of twelve people, among them nine young teenagers. Well apart from the grave and impressive enough damages to the rights to life and personal integrity these families had suffered, surrounding it all was the additional realisation that there had been clear signs of discrimination based on socio-economic factors, that for myriad conditions this wouldn't have happened had their children not been poor, and if for some reason it had occurred to young people with a more 'favourable' background, the reaction by public authorities and the attempt to guarantee access to justice would have been radically different, as evidenced by analogous situations. This case brought with it particular insight of the pervasive effects poverty and inequality may hold as human rights violations in themselves and as a root cause of the structural vulnerability and human insecurity they entail.

I also was able to meet and talk with the mother of one of the disappeared, sexually abused and killed girls of the *Cotton Field Case v. Mexico* judgment by the Inter-American Court of Human Rights, analysed in this text, who experienced 'empowerment' amidst the terrible background of a fatal lack of 'protection', to use the human security language. A brave woman with a low literacy level, economically disadvantaged, who in the aftermath of her daughter's tragic death, faced authority denial, disregard and discrimination. At the beginning of the litigation process, she did not see herself as a political actor, much less as an agent of her case or a holder of rights, as she explained herself. She described her experience of the last fifteen years involved in the case, how she had learned the meaning of "strategic litigation", civil society, human rights, the way in which her case was "paradigmatic" and it could open the way for others to be argued on the same basis. At the end of the talk she wished to clearly summarize her experience: the enormous power she had found in her daughter's memory that had eventually turned her into another woman -a much better woman-, and the struggle to find meaning in the middle of incommensurable pain: "My daughter died so that I could be born". It is these testimonies of human dignity that bring me to search for better paths for addressing our common humanity and accompany this struggle of people to construct justice.

2. Introduction and summary

Long-established concepts of national or military security, focusing on the territorial State, are unfit to analyse and address factors of risk, threat or sudden change in the daily lives of persons – many of them transnational or not involving armed force,¹⁸ such as poverty, environmental hazards, global epidemic diseases, natural disasters, and gender-based violence. All these elements of menace that affect people's rights and dignity, have usually not been considered as security-related risks which the State has an obligation to prevent or ameliorate, according to human rights standards as will be reviewed throughout this thesis. Such threats often become invisible in the public debate that generally centers its concerns on national security of the State, or in some cases on public security related only to combating crime or violent conflict which employs armed force.

It can be argued that the fragmented attention to each of these problems does not offer a holistic approach to phenomena that are actually interrelated and therefore limits the development of more structural solutions to the violation of human rights that may derive from such situations.¹⁹ Thus, the notion of human security, centered on the individual instead of the State, emerges as a possible means to review and attend all these conditions, whether or not they result from conflicts between States and independent of the fact that they occur within armed conflict.²⁰

Turning to some of the modern challenges at the heart of the human security concern, namely widespread socio-economic deprivation and disparity, it is true that poverty and inequality have been present throughout the twentieth century and have permeated the first years of the twenty-first. However, the current level of inequality and the pervasiveness and gravity of poverty have reached unexpected levels, standing far away from the promises of globalization. Furthermore, in some readings, the polarization between rich and poor has been caused to a great extent precisely by globalization.²¹ In any case, data indicated that by 2004 the situation was that of “2.5-3 billion people...living on less than two dollars per day. While *human security* for some is being enhanced, for many it is being eroded. Two-thirds of the global population appear to have gained little or nothing to date from the economic growth that occurred as a result of globalization”. Indeed, in the 1990s income inequalities increased harshly as shown in the UNDP Human Development Report for 1997 which indicated that the world's poorest people, estimated at twenty per cent of the global population, received 1.1 per cent of global income, compared with 1.4 per cent in 1991, and 2.3 per cent in 1960.²²

Human security thus comes forward as the first concept at the international level to encompass traditional conceptions of three central propositions: security, development and human rights, to

¹⁸ Fukuda-Parr, Sakiko, “New Threats to Human Security in the Era of Globalization”, in Chen, Lincoln, Sakiko Fukuda-Parr and Ellen Seidensticker (editors), *Human Insecurity in a Global World*, Harvard, Harvard University Press, 2003, pp. 1-13.

¹⁹ See Alkire, Sabine, “Concepts of Human Security”, in *Human Insecurity in a Global World*, *op. cit.*, pp. 33-34.

²⁰ In this sense, “it is undoubtedly true that *development* rarely takes root without *security*; it is also true that *security* does not exist where human beings do not have access to enough *food*, or clean *water*, or the *medicine* they need to survive. It does not exist where children cannot aspire to *decent education* or a *job* that supports a family. The absence of hope can rot a society from within”; Barack Obama, Remarks at the Acceptance of the Noble Peace Prize, 10 December 2009, Oslo, Norway. Emphasis added.

²¹ Jones, John F., “Human security and social development”, in *Denver Journal of International Law and Policy*, Winter, 2004, p. 5.

²² *Ibidem*.

map the relations and also to fill the gaps between them.²³

Indeed, explicitly depicted as “human security” by the United Nations Development Program (UNDP) in 1993, and fully articulated in 1994, human security thus owes its international genesis to the expansion of classical security conceptions first brought forward by the UN Security Council and then conveyed under the umbrella of development done by the UNDP in these first years after the end of the Cold War. A decade later, human rights escalate to a more important role in the international scene in the 2003 Report of the Commission on Human Security, *Human Security Now*.

The links between conflict, security and development have been analysed at the global level in different forums, most notably by the World Bank in its recent *World Development Report 2011: Conflict, Security and Development*.²⁴ The triangular relationship between human development, human rights and human security (under the acronym of “Human Derise” stemming from the three terms), has also been pointed out as a successful partnership used to improve life quality for disadvantaged sectors of society, for example, through poverty reduction strategies in certain national settings.²⁵

Parallel to the concerns raised in Chapter III of this thesis dealing with violence against women and human rights of women and girls, the links between several forms of inequality and gender-based discrimination, on the one hand, and socio-economic development on the other, have also taken priority in the World Bank’s latest report *World Development Report 2012: Gender Equality and Development*.²⁶ Intersecting with some of the concerns raised in Chapter IV of this thesis on the risks to undocumented migrants’ rights, the International Red Cross and Red Crescent has dedicated its most recent report to forced migration and displacement.²⁷ It is also not a coincidence that recently, in 2012, the Inter-American Commission of Human Rights (IACoHR) decided to broaden the scope of the mandate of its Special Rapporteur on the Rights of Migrants to cover other vulnerable groups in need, in order to respond to the multiple challenges of human mobility

²³ Summary given by Ms. Mehrnaz Mostafavi, Officer in Charge of the United Nations Human Security Unit, New York; interview carried out on April 8, 2011. In this sense, see also Klein Goldewijk, Berma, “Why human? The interlinkages between security, rights and development”, in *Security and Human Rights*, Vol. 19, Issue 1, 2008, pp. 24-37.

²⁴ World Bank, *World Development Report 2011: Conflict, Security and Development*, April 11, 2011. The report stresses that “Some 1.5 billion people live in countries affected by repeated cycles of political and criminal violence, and no low-income fragile or conflict-affected country has yet to achieve a single Millennium Development Goal. Fixing the economic, political, and security problems that disrupt development and trap fragile states in cycles of violence requires strengthening national institutions and improving governance in ways that prioritize *citizen security, justice, and jobs*”, at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS.html>. Emphasis added. The Report specifically sets forth that “citizen security” is similar to human security in its people-centered approach and it covers *all* members of society, but concentrates on “freedom from physical violence and freedom from fear of violence”, p. 16. Also interesting in relation to the theme of this thesis are the analysis of data referred to the correlation between human rights abuses and future conflict risk (Box 2.8, p. 82), although it mainly concentrates on violations to civil and political rights -arbitrary detentions, forced disappearances and extrajudicial killings-; and the account of the gender-disaggregated impacts of violent conflict (Table 1.3, p. 61).

²⁵ Hong Hai, Nguyen, “Human rights – human security – human development. Assessing the inter-relationships of human development, human security and human rights in poverty reduction in Vietnam”, Document presented at the Human Security Conference, University of Thailand, 2007.

²⁶ See the World Bank’s *World Development Report 2012: Gender Equality and Development*, available at <http://econ.worldbank.org>

²⁷ The International Federation of Red Cross and Red Crescent Societies (IFRC), *World Disasters Report 2012: Focus on forced migration and displacement*, Imprimerie Chirat, Lyons, France/Geneva, 2012.

in the region and focus on the respect and guarantee of the rights of migrants and their families, as well as those of asylum seekers, refugees, complementary protection seekers and beneficiaries, stateless persons, victims of human trafficking, and internally displaced persons.

This thesis seems timely as well when the six strategic priorities identified for 2012-2013 by the UN Office for the High Commissioner for Human Rights (OHCHR), refer in some degree to the main human rights concerns examined in this text:

- a) Countering *discrimination*
- b) Combating *impunity* and strengthening accountability (also framed as Impunity, *Rule of Law* and Democratic Society)
- c) Pursuing *economic, social and cultural rights* and combating *poverty*
- d) Protecting human rights in the context of *migration*
- e) Protecting human rights during armed conflict, *violence and insecurity*
- f) Strengthening international human rights mechanisms and the *progressive development of international human rights law*.²⁸

The agenda setting by the UN OHCHR, active in all parts of the world, through singling out these concrete issues, holds significance for legal scholarship in the field of human rights insofar as it highlights the human rights problems that present patterns and degrees of gravity leading to preoccupation and axis for action by the main UN human rights body. Among all the human rights critical challenges present at the global, regional, national and local level, and in contexts with different and multi-layered levels of development, economic, social and political settings, and ethnic, cultural and religious backgrounds, these were the six common denominators identified as being representative enough to hold general significance for guiding UN action in the field, and involving as well all the other state actors, human rights mechanisms (including academics as independent experts), national human rights institutions and civil society organizations engaged with the OHCHR through its daily activities. On the one hand, the prioritized themes constitute empirical realities of human suffering and structural challenges that in the view of OHCHR need first-ranking attention, and on the other, they point to political lines of action where the OHCHR evaluates that there are gaps to be covered and committed human rights work to be done. This listing and the corresponding OHCHR management plan, drafted and prepared in parallel to the writing of this thesis, would then open the way and signpost promising roads to follow if wishing to provide an academic contribution, valuable for human rights protection and legal advancement.

Turning then to the purposes of this text, in addition to the fact that there is an on-going debate on the direction human security should take, the specific relationship between human security and human rights remains underexplored, especially as to its legal implications. This gives reason to this thesis which concentrates on examining this dimension in the field of international law, in particular in the case of human rights of women and girls, as well as regarding human rights of non-citizens, especially undocumented migrants.

The notion of human security, constructed in the international arena, offers an interesting opportunity to further analyse its relationship to human rights, a historically older concept also

²⁸ See by the UN OHCHR, *OHCHR Management Plan 2012-2013*, at http://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_mp_2012_2013_web_en/index.html#part-i-strategic-priorities, and *Human Rights for Everyone Everywhere*, at http://www.ohchr.org/Documents/AboutUs/Leaflet_OHCHR_EN_print.pdf

relevant internationally, largely in the legal terrain. However, as it has been stressed, “different from other academic disciplines, international law has been reluctant to respond to the rise of human security, and the potential of human security as a possible global normative framework has attracted less attention”; a fact worth noting if it is considered that “human security...does indeed pose a challenge to international law”.²⁹ Indeed, “despite its relevance to central questions of international law, human security has until recently received little attention from international lawyers”,³⁰ although increasingly one may find attempts from international legal scholars, or from the perspective of international law, to deal with central elements of the human security conception, such as vulnerability and its role in human rights law,³¹ the twin human security pillars of protection and empowerment as related to human rights of women and girls,³² national origin and legal status as risk factors for human rights of non-citizens (comprising migrants, asylum seekers, refugees and stateless persons),³³ or directly to examine the legal relevance of human security for human rights’ framework and practice.³⁴

In whichever of its conceptions, it is submitted that human security is useful to bring light to threats that under the dominant security logic would otherwise remain invisible, such as violence against women, including domestic violence, as well as legal irregularity of migrants as a condition of risk. And of course not merely those threats come to mind. Climate-change induced displacement, human trafficking, the dangers affecting children –the possibility of being recruited as a soldier, being affected by armed conflict, the sexual exploitation of children, especially girls, for commercial purposes-, unimaginable global concerns in times of the Universal Declaration of Human Rights, have become sources of massive human suffering and harm to human rights.

Against this background of myriad conceptions and functions of human security, reviewing the points of connection between human security and International Human Rights Law more specifically may contribute to a better understanding of the idea of human security and assessment of its possible utility. As it will be evidenced in Chapter I, there are still many dispersed definitions in academic circles and among international organizations and States that promote this

²⁹ Oberleitner, Gerd, “Human security: a challenge to international law?”, in *Global Governance*, vol. 11, April-June 2005, pp. 185-186, available at <http://www.accessmylibrary.com/article-1G1-132847591/human-security-challenge-international.html>

³⁰ Von Tigerstrom, Barbara, *Human Security and International Law. Prospects and Problems*, Hart Publishing, Oxford and Portland Oregon, 2007, Introduction page.

³¹ See Chapman, Audrey R. and Benjamin Carbonetti, “Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights”, in *Human Rights Quarterly*, No. 33, 2011, pp. 682–732. Regarding the regional level, see Möschel, Mathias, “Is the European Court of Human Rights’ Case Law on Anti-Roma Violence ‘Beyond Reasonable Doubt’?”, *Human Rights Law Review* 12, no. 3, Oxford University Press, 2012, pp. 479-507; there is also a fascinating study under way by Lourdes Peroni and Alexandra Timmer related to the jurisprudence of the European Court on Human Rights on ‘vulnerable groups’ in non-discrimination case law, “The Ability of Vulnerability in European Human Rights Law”, draft article presented at the seminar on Global and Transnational Human Rights Obligations, European University Institute, December 1, 2011. On the role of both the Inter-American Commission and Court of Human Rights in this field, see González, Felipe, “The Experience of the Inter-American Human Rights System”, in *Victoria University Wellington Law Review*, Vol. 40, issue 1, 2009-2010, p. 118.

³² See Heyzer, Noeleen, “Combating Trafficking in Women and Children. A Gender and Human Rights Framework”, in Truong, Thanh-Dam, Saskia Wieringa and Amrita Chhachhi (editors), *Engendering Human Security. Feminist Perspectives*, Women Unlimited, India/Zed Books Ltd., USA, 2006.

³³ See Edwards, Alice and Carla Ferstman (editors), *Human Security and Non-Citizens: Law, Policy and International Affairs*, Cambridge University Press, Cambridge, 2010.

³⁴ See Lester, Eve, “Socio-economic rights, human security and survival migrants: Whose rights? Whose security?”, in *Human Security and Non-Citizens: Law, Policy and International Affairs*, op. cit., pp. 314-356.

idea of security.³⁵ It also demonstrates that the concept has been quite resilient and what seems clear is that it is here to stay. Proof of this may be found in recent debates, not only in the academic arena, but also in international organizations at the regional and global level, most importantly, in the UN. Indeed, the present is an interesting moment to carry out the reflection proposed in this thesis, as there is an on-going debate triggered by the UN Secretary General's (UNSG) *Report on Human Security* of May, 2010, the UN General Assembly's (UNGA) Resolution of July 2010, and the resulting *Second Report on Human Security* of 2012 presented by the Secretary General to the General Assembly for its consideration. This report deals with the 'common understanding' ascribed by States to the notion of human security, the outcome of which will determine to a great extent the road this idea will follow in coming years.³⁶ The UNGA discussed this last report and its recommendations and adopted in October 2012 a resolution expressing its general agreement with the 'common understanding' of human security proposed by the UN SG.

Against this background, this thesis research tries to answer the question of whether human security may provide tools for an expansive interpretation of human rights and their correlative State and non-State obligations, especially in the context of structural vulnerability; and inversely, if a human rights-based approach, and in particular, a gendered and human rights-based approach, may contribute to a more accurate definition of the scope of human security and the types of violence it takes into consideration.

Thus, **PART 1** of this text, as represented in **Table 1** below, will focus on the following central aims:

In Chapter I, the text weaves together some of the main views and uses of human security from the fields of development, political science, international relations, critical security studies and international law, in order to attempt to provide a richer and more complete narrative of the history of the notion, to then narrow the focus to the international legal dimensions and expressions of human security. It will present an overview of the different notions of human security and their evolution (section I.2), of the critiques towards the human security approach and proposals to confront them (section I.3), and of the practical measuring exercises of human security and related attempts of diagnosis, as referred more generally to global governance and the generation of indicators (section I.4). It will also describe and evaluate in section I.5 the 'common understanding' of human security, mainly focusing on the UN Secretary General's *Second Report on Human Security*, presented to the UN General Assembly in April 2012 and endorsed by this last body in October 2012 (I.5.1), but also looking briefly at some recent evolutions on the project on the 'right to peace' as related to human security by the UN Human Rights Council in 2012 (I.5.2). Based on the previous sections, the text will present an assessment and proposals referred

³⁵ Alkire, Sabine, *op. cit.*, p. 34.

³⁶ In a resolution of July 2010, and following the Report of the UN Secretary-General on Human Security in March 2010 (A/64/701) and the first formal debate related to human security organized by the President of the United Nations General Assembly (GA) in May 2010, the GA requested the Secretary-General "to seek the views of the Member States on the notion of human security, including on a possible definition thereof, and to submit a report to the General Assembly at its sixty-sixth session", A/64/291, 16 July 2010, O.P. 3. An informal debate consisting of a dialogue between independent experts and Member States took place on April 14, 2011, and as a result of these debates and the written submissions by Member States, the UNSG presented its *Second Report on Human Security* to the UNGA in April 2012. This last body agreed on the 'common understanding' proposed therein in October 2012: UN General Assembly, A/Res/66/290 "Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome", 25 October 2012.

to the most useful way of characterizing human security in terms of a working understanding of a threshold definition founded on a human rights-based approach (I.5.3).

In Chapter II it will analyse critically how human security relates to human rights and some concrete forms in which the elements of human security are reflected in International Human Rights Law and how they link to Public International Law more generally. The approach of International Law to *risk* and *vulnerability*, central elements of human security, is looked at as a general umbrella under which the development of security concerns as related to protection of persons has taken place, particularly through international human rights and refugee law (II.1.1). The human security-human rights relationship is examined in section II.2 through looking at some of the main legal intersections between human security and human rights: first, it looks at how human rights law has treated security in general through the embodiment of the rights to personal security, social security, security in tenure and food security, and sets the stage to ask whether human security is or should be a human right (II.2.1); to fully approach this question, the dialogue between human security and human rights is taken a step further through exploring it in light of the sources of Public International Law and bringing such conversation to port through analysing Article 28 of the Universal Declaration of Human Rights and the implications of a *facilitating environment* for human rights' realisation (II.2.2); next in further narrowing the scope, an outlook is presented on the specific manner in which the human security-human rights link has been considered in each regional human rights context (II.2.3); and the particular links of human security to economic, social and cultural rights (ESC Rights) are spelled out, given the constant reference to human security as a notion that brings to the picture threats of an economic and social nature that would otherwise remain invisible (II.2.4). The chapter then presents in section II.3 some proposals as to how to continue developing the relationship between human security and human rights in a resourceful and constructive manner for both.

In **PART 2**, as presented graphically also in **Table 1** below, the thesis then moves on to apply the general conception of human security discussed in Chapter I, and the human security/human rights framework studied in Chapter II., in relation specifically to two thematic cores under human rights law: violence against women and girls, on the one hand; and on the other, human rights of non-citizens, in particular, undocumented migrants. The aim is to evaluate the human security framework of analysis proposed throughout this text as applied to two of the most pressing global concerns today.

The first, violence against women and girls, is one of the most pervasive and widespread threats to a great sector of the population –more than half worldwide-, even in well-off and/or democratic societies, otherwise considered 'peaceful'. The second, the human rights of undocumented migrants, poses legal questions at the conceptual level in terms of the universality of human rights when considered in light of legal status. Other challenges emerge also in the practical sphere, whilst the lack of protection towards undocumented migrants has been aggravated with the economic crises in the US and Europe, together with new interrogations derived from the Arab Spring. The issue of undocumented migration also connects to most countries in the world, whether as sending, transit or host societies.

Both themes, violence against women and violations to rights of undocumented migrants, find a common denominator in being present in liberal democratic polities holding generally acceptable records in human rights' respect, and, more importantly, they enter the realm of structural vulnerabilities which are faced by considerable sectors of the population. These vulnerabilities are,

nonetheless, confronted with gaps in human rights law and/or implementation that have been insufficient in addressing concerns on both topics. These cracks in the system allow for thousands of persons to fall between norms, to remain unprotected and in some cases, to confront life-threatening situations. Also, the threats to human security in the form of socio-economic deprivation, as evidenced in the section of human security and ESC Rights, are a *cross-cutting issue* placing both women and girls facing violence as well as undocumented migrants -often poor and socially marginalized-, in heightened conditions of vulnerability. It is not a coincidence that legal, philosophical, political and sociological scholarship, international and inter-governmental organizations' reports, human rights universal and regional mechanisms and multiple civil society activities have recently centered their radar in prioritizing both issues in their agenda. Thus, the present text analyses whether human rights law has something more to offer in the face of these challenges and, if so, how it may do so effectively in order to deliver some of the promises envisioned by the human rights spirit and the legal architecture constructed around it.

Thus, in Chapter III, the text will look more closely at the general conception of human security discussed in Chapter I in relation specifically to violence against women and girls and their human rights. It will first reflect critically on how a gendered human security would have to be shaped (section III.2).³⁷ The chapter examines this relationship in the form of an in-depth thematic study covering the normative landscapes of the UN, the Inter-American, European and African human rights' systems. It also reviews paradigmatic cases resolved by the Inter-American and European Courts of Human Rights as exemplifying some of the potentials of the human security-human rights symbiosis (section III.3). Considering the human security approach to critical risks and vulnerabilities, this chapter explores violence against women as one of the most pervasive and widespread threats worldwide. At the same time, the concept of violence against women and girls has been strongly developed by International Human Rights Law, although seldom taken into account explicitly in human security concerns relating to violence. Thus, in the last part (section III.4), the chapter examines the consequences of the interaction of applying a human security lens to the legal analysis of violence against women and their human rights, and of including the human rights definition of violence against women within the human security sphere, with the aim of fleshing out the added value of this dialogue and bringing to light the synergies between human security and human rights of women and girls to move forward in this debate.

In Chapter IV of this thesis, the existing international human rights law applicable to migrants, in particular undocumented migrants and other non-citizens, is analysed, taking the UN standards as a central departing point and reviewing the regional standards on the subject (section IV.2). The chapter will then sketch out the interconnections between human security and human rights of undocumented migrant persons, at the empirical level as well as in legal analysis, by viewing legal irregularity as a source of risk (section IV.3). This part also includes a particular section on the

³⁷ It must be recalled that violence against women is conceived as a subcategory of gender-based violence. This last type of violence also covers for example the experiences of male violence against gay men, of violence based on gender by women or men against transgender persons, or of women against women in the absence of their performance of expected gender roles; in this sense see the analysis by Leach, Fiona and Sara Humphreys, "Gender violence in schools: taking the 'girls as victims' discourse forward", in Terry, Geraldine and Joanna Hoare (editors), *Gender-Based Violence*, Oxfam GB, London, 2007, pp. 106-120. However, women and girls "constitute the majority of victims of gender-based violence and men the majority of perpetrators"; Hayes, Ceri, "Tackling violence against women: a worldwide approach", in Terry, Geraldine and Joanna Hoare, *op. cit.*, p. 2. Therefore, for the effects of our analysis, this text considers gender-based violence in its most frequent understanding as violence against women and girls (VAW) and concentrates on VAW as the most widespread and illustrative form of gender-based violence, and also as a human rights violation which has been dealt with extensively by International Human Rights Law.

application of the gendered human security lens as proposed in Chapter III to spell out the particular risks and types of violence faced by undocumented migrant girls and women, as well as the vulnerabilities experienced more specifically by female undocumented migrant domestic workers. Similarly, it reflects on the specific risks confronted by asylum-seekers in a time when economic crisis and mixed flows of migration allowed for weakening protection of this group of non-citizens. More generally, the human security approach allows for identifying risks to several human rights of undocumented migrants, quite notably that of access to justice. In the last part (section IV.4) the text will draw the picture of how some of the identified normative tools may be utilized to enhance human rights protection when applied through a human security-based approach. It will analyse illustrative quasi-judicial and judicial cases from the UN and regional human rights' systems in order to exemplify how a human security-sensitive perspective may orient human rights' interpretation when put to work in practice, as well as the consequences that may unfold when it is overlooked. The chapter concludes in section IV.5 with some remarks on the right to have access to rights as a necessary human security requirement for the respect and fulfilment of the universal human rights of undocumented migrants.

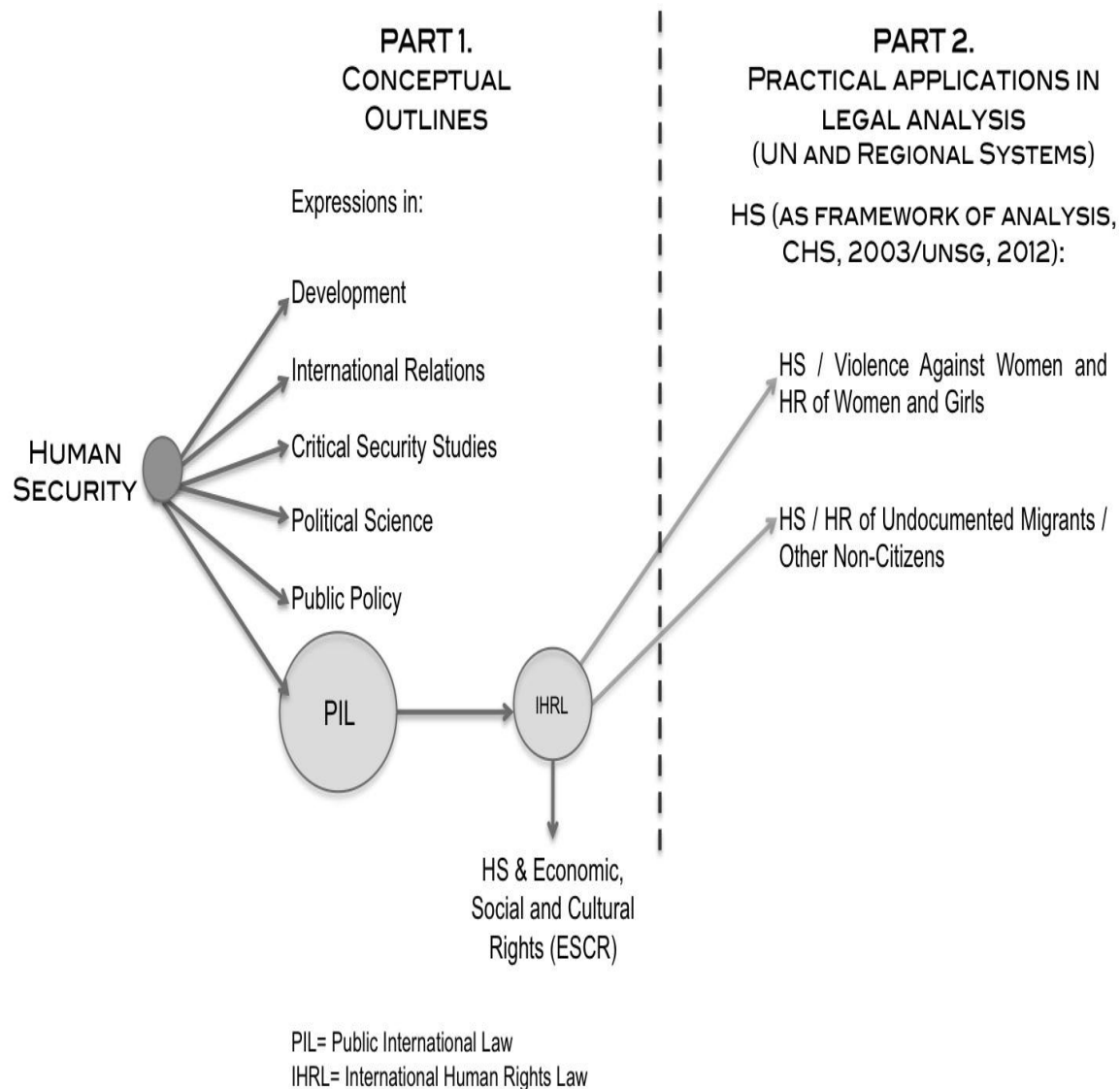
Through this examination, the text presents the central arguments of the thesis and proposes a different framework of analysis to reshape the way we traditionally think of security and its legal implications in relation to human rights. Chapter III and IV in particular, put forward ways in which this framework could be applied in the practical arena of the legal evaluation of human rights violations, especially quasi-judicial and judicial evaluations, as well as agenda setting for the construction of norms and policies in a concrete area of human rights, for instance, human rights of women and girls, as well as human rights of non-citizens, particularly undocumented migrants.

By means of studying these points, the text concludes in Chapter V as to some ways in which human security may contribute to a more integrated and holistic understanding of the State's human rights obligations in the context of vulnerability and thus broaden the existing boundaries of international law. The thesis argues that human security with its accent on critical and widespread threats, and therefore on the collective dimension of risks, should be seen as a precondition and at times a necessary complement for the exercise and enjoyment of individual human rights which, when viewed each one on its own footing, may tell us a somewhat incomplete story of the realities that people are facing on the ground.

At the same time, the text suggests approaches by which the notion of human security would become more precise from an analysis through International Human Rights Law, and thereby define more clearly its scope and content. By way of this examination, these chapters intend to evaluate some of the limitations and potentials at the international, national and local level, of the human security-human rights symbiosis and the implications it may hold for the everyday lives of persons and groups, particularly those in conditions of structural vulnerability.

The general organization and content of the thesis as explained is summarized as represented graphically below in **Table 1**:

Table 1



Thus, as represented in **Table 1**, human security will be explored in **Part 1** of the thesis from the conceptual proposals made in different fields (Chapter I), and will be studied in a closer view as to its reflection in public international law and then narrowed down to the expressions of human security in international human rights law (Chapter II). As a cross-cutting theme in the whole thesis, socio-economic vulnerability and its bearing on human security and human rights, more particularly, on ESC Rights, will be analysed as well. Then the conceptual framework of human security constructed in the first part of the thesis and built upon the definition of the 2003 CHS report and the 2012 report by the UNSG, will be studied as to its practical application to two thematic cores within human rights law as reviewed in Part 2: violence against women and girls and women's human rights (Chapter III) and human rights of undocumented migrants and other non-citizens (Chapter IV), as issues reflecting the structural vulnerability suffered by certain persons or sectors of society. Both in-depth illustrative case studies are considered jointly representative of the potentials of the human security/human rights synergies and I propose that they result in legal implications of general significance, as will be detailed in the following

chapters. A full discussion of the lessons learned from the interaction between human rights and a gendered human security as explored in these two themes, is engaged in through the concluding part of this text (Chapter V). As a result of this proposed theoretical framework, several *interpretative synergies* are presented as tools that may hopefully prove beneficial to advance both the human security and the human rights of persons and groups, especially those most vulnerable.

PART 1 CONCEPTUAL OUTLINES

Chapter I. Human security: an overview

I.1 Introduction

Given that since the genesis of human security in the international community, there have been varied debates and ideas as to how to best conceive it and make it operational, the first step to facilitate an analysis of its relation to human rights is to understand the main points of this discussion that has equally grasped the attention and participation of international and regional organizations, academia and non-governmental organizations across the globe. Thus, this chapter analyses in section I.2 the evolution of the notion of human security, its strengths and weaknesses; in section I.3, the critiques that have been raised towards the human security approach and how this text deals with them; section 1.4 presents an overview of the different measurements that have been developed in terms of its practical applications of human security; and section 1.5 summarizes the current ‘common understanding’ of human security as picked up in the *Second Report of the UN Secretary General on Human Security*, of April 2012, and generally endorsed by the UNGA in October 2012. It also briefly mentions some recent considerations on the ‘right to peace’ and human security, and explores the possibilities of building on this ‘common understanding’ towards a threshold conception of human security founded on a human rights-based approach, that would in turn open the door for a gendered human security, as explained in the text.

In any case, what should be pointed out at this initial stage is that, based on the existing reflections in the field, this analysis stems not from a view to securitize different issues, including human rights issues, but rather to humanize security.

I.2. Changing conceptions of security and the evolution of human security

Traditionally, security had been considered a State matter, both as the subject in charge of providing it to the persons under its jurisdiction, as well as the object worthy of protection and regulation through laws and policies. The security of individual human beings, in contrast, was largely ignored.³⁸ It has been argued that concepts of national or military security, focusing on the territorial State, are unfit to analyse and address factors of risk, threat or sudden change in the daily lives of persons –many of them transnational or not involving armed force–, such as poverty, environmental hazards, global epidemic diseases or natural disasters.³⁹

It is true that many of the problems affecting individuals and addressed by the human security concern are not new and thus human security should not be depicted as a completely novel answer

³⁸ MacFarlane, Neil S. and Yuen Foong Khong, *Human Security and the UN. A Critical History*, Bloomington, Indiana University Press, United Nations Intellectual History Project, 2006, p. 19.

³⁹ Fukuda-Parr, Sakiko, “New Threats to Human Security in the Era of Globalization”, in Chen, Lincoln, Sakiko Fukuda-Parr and Ellen Seidensticker (editors), *Human Insecurity in a Global World*, Harvard, Harvard University Press, 2003, pp. 1-13.

to contemporary challenges. Some authors trace the historical origins of human security to eighteenth century enlightened liberalism and the thinking of Montesquieu, Rousseau and Condorcet in their visions of the priority of protecting the individual versus not only the State, but also vis-à-vis any other actor who represented a threat to his or her life, freedom, physical integrity or property. For Taylor Owen, the contrasting standpoints of Hobbes, Grotius and Kant in seventeenth and eighteenth century political philosophy that positioned the State as the privileged and ideal unit for centralizing and guaranteeing individual security were the ideas that in the long-run dominated security discourse and ultimately the organization of the international State-centred system as we know it.⁴⁰

Without digging deeply into the historical origins of the concept, which is not the aim of this thesis, I do wish to point out, however, that apart from political theory and international law, interestingly enough, this research led the way to discover some accounts of the human security idea in the work of nineteenth century journalists working for *The Times* in London. The spectrum of issues covered in these newspaper concerns between 1831 and 1917 was ample and diverse, ranging from discussion on the prohibition of widow-burning in India and “security of human life” (1831); a House of Commons debate on safety in railway travel as a matter either of public regulation or of settlement by private companies (1842); the protection of “human security” as related to food scarcity in the United Kingdom (1848); “the regular play of those great laws of nature which are in accordance with *human security*” referring to an earthquake in the south of Italy (1858); “the security of human life and the obligation of the law to protect it” (1862); and finally in 1917 to “security of human rights in war”.⁴¹ Because of the interest of the literal mention of “human security”, made within the ambiance of uncertainty and risk in Europe and more particularly the famine in Ireland, turning to what we could today term “food security” of the U.K., a reproduction of *The Times* of October 18, 1848 is included below:

...So great are the vicissitudes of the principal personages that it is already impossible to recognize them. As for ourselves, with avalanches thundering past our heads, we are only hoping that our turn may not come next. Hence the singular abeyance of domestic and economic speculations. However, we must revert to them, for therein consists our best *human security* against the storms of revolution.

The first *condition of peace* and comfort is a very vulgar one. Without *plenty of food* no nation will be either happy or contented. Plenty within one’s own borders, where it is possible, is perhaps the most preferable lot. But it is not always possible, and, possible or not, is not the case with us. There is very little doubt that this year, owing to the partial failure of the potato crop, and the very moderate crop of wheat, we shall have to import rather largely.⁴²

In viewing the described newspaper narratives, it may be perceived that although the specific threats are different than today, human vulnerability especially in the face of natural disasters, the critical state of women’s security, the protection of life and personal integrity, the guarantee of

⁴⁰ Owen, Taylor, “Challenges and opportunities for defining and measuring human security”, in *Disarmament Forum*, three 2004 - Human rights, human security and disarmament, pp. 1-2.

⁴¹ *The Times*, London: “Widow-Burning in India. Letter to the Editor from and East India Proprietor”, 1831 (exact date and page not visible); Monday, June 20, 1842 (title not visible); Wednesday, October 18, 1848, p. 4 (title not visible); Saturday, January 20, 1858 (title not visible); “Criminal Court”, March 6, 1862; and “Daylight air raid. 76 killed and 154 injured”, Monday, May 28, 1917.

⁴² *The Times*, London, Wednesday, October 18, 1848, p. 4 (title not visible). Emphasis added.

sufficient material conditions for survival and the insurance of rights within armed conflict, are concerns that are in some manner shared by contemporary human security proponents. Previous preoccupations in time seem to be linked to the more traditional version of security as related to life and personal integrity, as well as to social and economic conditions and catastrophes by accidents or natural adversities, all in the context of peace; whereas the more recent newspaper versions once in the twentieth century give account of concerns during the armed conflict of World War I and thus closer to humanitarian law. The former points of awareness seem to have been lost somewhere on the way, possibly shadowed by the more immediate exigencies of the war. As a hypothetical suggestion, similar examples could conceivably be found in journalistic or other understandings of security, not necessarily legal, in different parts of the world. Whether this is the case or not, the construction of security as the protection of the human person and the relationship between this need/right and the role of public power, seems to enjoy a certain historical social grounding that could be worth exploring more in-depth.

Turning now to the modern conception of human security, change of the traditional security views was being encouraged in the decades after World War II since the late 1970's and early 1980's. At the UN Level, the report of the Brandt Commission in 1980 had pushed for a different understanding of security, with people foremost in mind, stressing that "the purely defensive concept of security should be enlarged to include hunger, disease, poverty, environmental stress, repression, and terrorism, all of which endanger *human security* as much as any military provocation". It also emphasized that to meet that aim "the international community has the responsibility to eliminate any social conditions that pose threats to the protection and dignity of people, before they erupt into armed conflict".⁴³ At the European level, the Final Act of Helsinki of 1975, negotiated and adopted by the Conference for Security and Cooperation in Europe -first called a 'child of the Cold War' and later a contributor to the reduction of tensions between East and West-, endorsed a vision which highlighted the "intimate relationship between problems relating to military security and problems relating to the promotion and protection of human rights".⁴⁴ The Helsinki Final Act actually endorsed a wide understanding of security dividing the Conference's areas of activity into three dimensions: the first covering political and military aspects of security; the second dimension comprising economic and environmental aspects of security, including economic development, science, technology and environmental protection; and the third dimension involving human aspects of security.⁴⁵

In 1987, the Brundtland Commission report, *Report of the World Commission on Environment and Development: Our Common Future*, noted that a "comprehensive approach to international and national security must transcend the traditional emphasis on military power and armed competition. The real sources of insecurity also encompass unsustainable development, and its effects can become intertwined with traditional forms of conflict in a manner that can extend and

⁴³ *Brandt Report*, examined in Quilligan, James Bernard, *The Brandt Equation: 21st Century Blueprint for the New Global Economy*, 2002. See also the work done by The Global Environmental Change and Human Security (GECHS), at <http://www.gechs.org/>

⁴⁴ Helgesen, Jan, Chapter 10, "Between Helsinkis – and Beyond? Human Rights in the CSCE (Conference on Security and Cooperation in Europe) Process", in Rosas, Allan and Jan Hegelsen (editors, with the collaboration of Donna Gomien), *Human Rights in a Changing East-West Perspective*, Pinter Publishers, London and New York, 1990, p. 248. See the account Hegelsen provides on the history of the negotiation and drafting process behind the Helsinki Act, its relationship with human rights law and diplomacy, and an evaluation of the consequences of such process up until 1990 (pp. 248-263).

⁴⁵ See Conference on Security and Co-Operation in Europe, *Final Act*, Helsinki, 1975; and "Helsinki Final Act signed by 35 participating States", Organization for Security and Co-operation in Europe, at <http://www.osce.org/mc/58376>.

deepen the latter."⁴⁶

Nevertheless, it was only after the Cold War that a political space was opened for a stronger institutional development of the human security notion, at the side of trans-border phenomena deriving from a more interconnected world. Thus, the modern form of human security emerged as a post-Cold War answer to threats that had been overlooked by State-centered conceptions of national, military and territorial security,⁴⁷ as well as to new risks posed by the process of globalization and the intensification of transnational relations, such as violent conflicts within States (and not only between States as had usually been the focus), sudden economic downturns, environmental dangers and global infectious diseases as Human Immunodeficiency Virus (HIV) and the Acquired Immunodeficiency Syndrome (AIDS), all of which create mutual and interlinked vulnerabilities for persons around the world.

Generally, the origin of this contemporary idea of human security is traced back to the work done within the United Nations Development Program in 1993 and 1994. It is true that the full articulation of human security at the international level finds its genesis in the UNDP. However, after the Cold War, the first mentions of human security within the UN institutional structure were actually suggested by the Security Council itself. Indeed, in 1992, "at a time of momentous change", the UNSC expressed a strong commitment towards a human security agenda in an open spirit of hope:

The absence of war and military conflicts amongst States does not in itself ensure international peace and security. *The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security...* The members of the Council agree that the world now has the best chance of achieving international peace and security since the foundation of the United Nations... They recognize that peace and prosperity are indivisible and that lasting peace and stability require *effective international cooperation for the eradication of poverty and the promotion of a better life for all in larger freedom.*⁴⁸

And then, in the first explicit mention of human security by one of the main UN bodies, it was addressed in the Secretary General's Report of that same year, *An Agenda for Peace. Preventive diplomacy, peacemaking and peace-keeping*, issued as a result of the Security Council's request set forth in the previous document.⁴⁹ In recognizing the changing global context and the *new dimension of insecurity*, the Report stressed that "poverty, disease, famine, oppression and despair" abound and are both sources and consequences of conflict that require the "ceaseless attention and the highest priority in the efforts of the United Nations". Tellingly, it viewed that time in history as a "moment of renewed opportunity", that should draw UN efforts to build peace, stability and security to "encompass matters beyond military threats" in order to break the fetters of strife and warfare. It emphasized that concerted attention and effort of individual States, of regional and non-governmental organizations and of all of the United Nations system, had to be

⁴⁶ World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future*, UN Doc. A/RES/42/187/Annex, August 2, 1987, p. 4.

⁴⁷ MacFarlane and Foong Khong, *op. cit.*, p. 20.

⁴⁸ Note by the President of the Security Council, UN Doc. S/23500, 31 January 1992, pp. 3-4.

⁴⁹ *An Agenda for Peace. Preventive diplomacy, peacemaking and peace-keeping*, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, A/47/277 - S/24111, 17 June 1992.

directed to work together to “identify at the earliest possible stage situations that could produce conflict” and “to address the deepest causes of conflict: economic despair, social injustice and political oppression”, as each had “a special and indispensable role to play in an integrated approach to *human security*”. The Report forwarded the view that the UN had to assess its own potential in maintaining international security “not only in its traditional sense, but in the *new dimensions* presented by the era ahead”.⁵⁰

For this to be rendered possible, the Report details a set of early warning systems that should work as preventive tools, much in the spirit of the ‘common understanding’ of human security proposed by the current UN Secretary General in 2012. The 1992 Report stressed the importance of such systems to be based on adequate fact-finding mechanisms and reports, including those of a socio-economic nature,⁵¹ a task similar to the triggering mechanism proposed in terms of human rights’ legal obligations and somewhat developed by the Inter-American system of human rights, as explained in Chapter III of this thesis.

Human security as a fully detailed notion was first briefly referred to by the United Nations Development Program (UNDP) in its Human Development Report of 1993, *People’s Participation*, and then fully articulated by Mahbub ul-Haq through the 1994 UNDP Human Development Report, called precisely *New Dimensions of Human Security*.⁵² Thus, human security was initially envisioned as a parallel road and an indispensable companion for human development.

It must be recalled that precisely in 1993, the Vienna Declaration and Program of Action had put an end to the historical discussion carried out during the Cold War regarding the hierarchy of civil and political rights with respect to ESC Rights or viceversa, and clarified that “all human rights are universal, indivisible and interdependent and interrelated”,⁵³ adopting an integral understanding of human rights. Therefore, it should not strike us as a coincidence that the UNDP also promoted a holistic view of human development and included within its scope the consideration of human security. In this sense, human security can be viewed as a catalyst for strengthening such integral vision of human rights.⁵⁴

Actually, the Human Development Report 1994 included a six-item agenda that reflects its concern with socio-economic equality and global justice as means of ensuring what the document considered ‘the peace dividend’ of that time. Specifically underlining that “the search for human security lies in development, not in arms”, the Report includes among such items, proposals explicitly based on the spirit of the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵⁵ some of them a preface as well to what would become part of the logic behind the Millennium Development Goals of 2000:

⁵⁰ *Ibid.*, paras. 13-16. Mention of human security in para. 16.

⁵¹ *Ibid.*, paras. 26 and following.

⁵² UNDP, *Human Development Reports*, 1993 and 1994, available at <http://hdr.undp.org/en/reports/> See UNDP 1993 Human Development Report, *People’s Participation*, at pp. iii; 2, 3 and 7 of Summary, and 12 of full report.

⁵³ Article 5, Vienna Declaration and Program of Action, UN General Assembly, World Conference on Human Rights, A/CONF.157/23, 12 July 1993.

⁵⁴ In this same respect, see Farer, Thomas, “Human Security: Defining the Elephant and Imagining its Tasks”, in *Asian Journal of International Law*, Volume 1, Issue 01, January 2011, at pp. 47-48.

⁵⁵ ICESCR, adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

- a) *A new world social charter* -to establish the framework of equality of opportunity among nations and people. The concept of development cooperation should be broadened to include all flows, not just aid.
- b) *Mobilization of the peace dividend* -to set concrete targets for reducing global military expenditure and for capturing the ensuing peace dividend to enhance human security.
- c) *A global human security fund* -to address the common threats to global human security.
- d) *A UN Economic Security Council* -to provide a decision-making forum at the highest level for global issues of human security.⁵⁶

In a contemporary analysis, it would seem that over time the item to have reached a most successful outcome is that of a global fund for human security, through the existence of the UN Trust Fund for Human Security, which in the last few years has dedicated an average of one million and a half USD per each regional project per year, adding up to a total of 22 million USD in the main on-going six national/regional projects (in different lengths between 2011-2015), plus many national projects with a specific budget for each one.⁵⁷ This would seem to contrast starkly with the approximate USD 186.8 million received annually by the UN OHCHR for the whole of its activities worldwide.⁵⁸

The proposal to create an Economic Security Council is quite interesting, especially in light of the points raised by human security detractors who fear for the concept being utilized to justify some form of military intervention. In studying the actual documents, it becomes clear that at least the intention of the first drafters, and a spirit that prevails until today according to the 2012 UN 'common understanding' that will be reviewed, is clearly of human security as a set of socio-economic development features as a pre-condition for peace and a strategic tool for its maintenance. In a deeper sense, it originally stemmed as a concern with global justice and the creation of a *new global ethic* based on universalism of all human rights.⁵⁹ The 1994 Report reflected concern with facts of inequality that in some aspects have not changed significantly twenty years later and in some matters have worsened:

The concept of sustainability is greatly endangered in a world that is one-fourth rich and three-fourths poor, that is half democratic and half authoritarian, where poor nations are being denied equal access to global economic opportunities, where the income disparity between the richest 20% and the poorest 20% of the world's population has doubled over the past three decades, where one-fourth of humanity is unable to meet its basic human needs and where the rich nations are consuming four-fifths of humanity's natural capital without being obliged to pay for it. The concept of one world and one planet simply cannot emerge from an unequal world. Nor can shared responsibility for the health of the global commons be created without some measure of shared global prosperity. *Global*

⁵⁶ UNDP, *1994 Human Development Report, New Dimensions of Human Security*, Overview, pp. 1, 5-6. Emphasis in original.

⁵⁷ This amount is calculated by adding the programmed budgets for the six main activities financed by the UNTFHS as described in its webpage; see www.untfhs.org

⁵⁸ This amount is calculated on the basis of the volume of the regular UN budget allocated to the UN OHCHR for the biennium of 2010-2011, USD 151.6 million (less than 3% of the whole UN budget), that is, USD 75.8 million per year, plus the approximate amount of USD 111 million of voluntary contributions received by the OHCHR in 2011, to sum up a total budget of the OHCHR of USD 186.8 million for 2011; see UN OHCHR Report 2011, pp. 124-125, available at

http://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011_web/allegati/16_Funding.pdf

⁵⁹ UNDP, *1994 Human Development Report, op. cit.*, pp. 13-14 and 21.

*sustainability without global justice will always remain an elusive goal. If this challenge is not met -and met decisively- human security will be at risk all over the world.*⁶⁰

Indeed, for the UNDP, following the original wording of the 1945 United Nations (UN) Charter (which expressed in its Preamble the Parties' commitment "to promote social progress and better standards of life in larger freedom"),⁶¹ there are two conditions that can foster human security: *freedom from fear* and *freedom from want*.⁶²

Therefore, human security as defined by the UNDP includes two main aspects: 1) safety from such chronic threats as hunger, disease and repression; and 2) protection from sudden and hurtful disruptions in the patterns of daily life -whether in homes, in jobs or in communities. Such threats can exist at all levels of national income and development. Based on this definition, according to the *Human Development Report* of 1994, the threats to human security can be grouped in seven categories:⁶³

1. *Economic security*: requires an assured basic income-usually from productive and remunerative work, or in the last resort from some publicly financed safety net. The Report touches on the particular risks faced in this area by young people, women and persons with disabilities. Against the background of an economy rapidly moving towards globalization and industrialisation, it addresses aspects that feed into economic insecurity for people both in rich and poor nations, such as difficulty in finding and maintaining jobs, temporary employment, employment in the informal economy, self-employment and precarious work and income insecurity, as well as the links between these forms of risk and the lack of or inadequacy of social security systems. Contrasting these visions with the recent economic and financial crisis of the last few years, one can realize the devastating effects that this type of interrelated threats can produce when materialized, and the heightened risk they represent for persons in vulnerable conditions, like undocumented migrants, asylum seekers and refugees, as will be explored in Chapter IV below.
2. *Food security*: means that all people at all times have both physical and economic access to basic food. This requires not just enough food to go round. It requires that people have ready access to food -that they have an "entitlement" to food, by growing it for themselves, by buying it or by taking advantage of a public food distribution system. The availability of food is thus a necessary condition of security -but not a sufficient one. People can still starve even when enough food is available- as has happened during many famines. As the 1994 Report put it, "People go hungry not because food is unavailable-but because they cannot afford it". Food security as a normative goal was included shortly after the UNDP Report in different instruments and has been developed since also as a human rights priority.⁶⁴ Sadly, lack of sufficient income and accessibility to purchase food, is still the

⁶⁰ *Ibid.*, p. 21.

⁶¹ Charter of the United Nations, signed on 26 June 1945, in San Francisco, available at <http://www.un.org/en/documents/charter/intro.shtml>

⁶² UNDP, 1994 *Human Development Report*, *op. cit.*, p. 24.

⁶³ *Ibid.*, pp. 24-35. All following references to the descriptions of the 1994 UNDP Report on the seven categories of human security are taken from these pages.

⁶⁴ See for example *Rome Declaration on World Food Security*, 1996, available at www.fao.org/wfs. The World Food Summit of 1996 also defined food security as existing "when all people at all times have access to sufficient, safe, nutritious food to maintain a healthy and active life". Commonly, the concept of food security is defined as including

main reason for starvation and food insecurity today, with the additional factor of price volatility caused by the recent global financial crisis.⁶⁵

3. *Health security*: the Report considers threats to health from the differentiation of developing and developed countries. In the first case, the major causes of death are infectious and parasitic diseases. Most of these deaths are linked with poor nutrition and an unsafe environment particularly polluted water, which contributes, for example, to the nearly one billion cases of diarrhoea a year. In industrial countries, the major killers were reported to be diseases of the circulatory system, often linked with diet and life style. Next comes cancer, which in many cases has environmental causes. In emphasizing identified sources of vulnerability in the two settings, it noted that in both developing and industrial countries, the threats to health security are usually greater for the poorest, people in the rural areas and particularly children.

With a clear gender perspective imposed by the realities faced by women, the Report highlights that within the general risks faced by poor people, the situation for women is particularly difficult. It emphasized that in 1994 the widest gap between the North and the South in any human indicator was in maternal mortality -which is about 18 times greater in the South, a gap which has unfortunately not been surpassed substantially in the current conditions experienced by women.

Indeed, although between 1990 and 2010, maternal mortality worldwide dropped by 47%, still today, every day, approximately 1000 women die due in childbirth or due to a pregnancy-related complication, 800 of them from *preventable* causes and 99% of all maternal deaths occur in developing countries, the highest rates related to women living in rural areas and among poorer communities.⁶⁶ Through the comprehensive view human security provides, and the indiscriminate focus on prioritizing the existence of a risk rather than its origin, one can further understand the fact that “at least 15 percent of all pregnant women worldwide encounter a *life-threatening complication*. In a conflict or a crisis, pregnant women are even *more vulnerable* because health services have collapsed, are inadequate or non-existent. But these women need access to quality emergency obstetric care whether they live *in a conflict zone, in a refugee camp or under plastic sheeting after a devastating earthquake*.” Certainly, conflict, epidemics, natural disasters, or the complete breakdown of a country’s health system are crises faced by millions of patients around the world every day. **“But a maternal death: that’s the avoidable crisis”**.⁶⁷ When crisis is escalated to become the everyday, that is, when women’s death rates by these causes are so high that “maternal mortality *is* the emergency”,⁶⁸ a clear connection can be traced between protecting women’s human rights as a generalized social need, and not only as a state of

both physical and economic access to food that meets people's dietary needs as well as their food preferences; see glossary of the World Health Organization at <http://www.who.int/trade/glossary/story028/en/>

⁶⁵ See Galtung, Irene, *Lawyers or liars? Is world hunger suable in court?*, PhD Thesis in Law, European University Institute, Florence, 2011. See also the article by Olivier de Schutter, UN Special Rapporteur on the Right to Food, “Reshaping Global Governance: The Case of the Right to Food”, in *Global Policy*, Volume 3, Issue 4, November 2012.

⁶⁶ World Health Organization, “Maternal mortality”, Fact sheet N°348, May 2012, available at <http://www.who.int/mediacentre/factsheets/fs348/en/index.html> Emphasis added

⁶⁷ Medecins Sans Frontieres, *Urgent Delivery - Maternal Deaths: The Avoidable Crisis*, Special Report, 7 March 2012, p. 4. Emphasis added. Underline in original.

⁶⁸ *Ibid.*, p. 25.

exception, in order to guarantee their human security.

As a reminder of the relationship of human (in)security to social and economic factors as dealt with in this thesis, let us be reminded that today “women in developing countries have on average many more pregnancies than women in developed countries, and their *lifetime risk of death* due to pregnancy is higher. A woman’s lifetime risk of maternal death – the probability that a 15 year old woman will eventually die from a maternal cause – is *1 in 3800 in developed countries, versus 1 in 150 in developing countries*”.⁶⁹ These risks do not only present themselves in a vacuum as an inevitable product of conflict and socio-economic deprivation but are often facilitated and increased by structural patterns of discrimination and violence against women and girls, a link which is duly highlighted in Chapter III of this text.

The UNDP 1994 Report underlined that another increasing source of health insecurity for both sexes is the spread of HIV and AIDS and noted that around 15 million people are believed to be HIV-positive, 80% of them in developing countries, an important statistic to keep in mind in light of the deportation cases that will be reviewed in Chapter IV of this thesis related to undocumented migrants and other non-citizens.

4. *Environmental security*: In 1994, it was already recognized that the environmental threats countries were facing were a combination of the degradation of local ecosystems and that of the global system. The air pollution affecting many urban concentrations in developing countries was underlined as a source of risk. The lack of clean and safe drinking water for more than one billion persons in the developing world and the inadequate sanitation affecting two billion were highlighted as a human security concern. As will be analysed in section II.2.4 below on ESC Rights, these are still pressing problems today, so much so that access to water has been recently recognized as a human right and a UN Special Rapporteurship created to address it. Lack of safe sanitation affecting millions of persons, overwhelmingly those living in poverty, is an outrageous fact in itself, it is also an expression of deep social inequality and injustice, and it constitutes today one of the least fulfilled Millennium Development Goals.

In looking at further environmental risks, water scarcity in certain parts of the world was flagged in the UNDP Report as a source of ethnic and political tensions. The Report also signalled natural disasters as representing increased threats for persons and communities – the number of such disasters registered at 16 in the 1960s, at 29 in the 1970s and at 70 in the 1980s- and recognized how “natural” disasters were often human provoked or enhanced, different levels of development determining the vulnerability of people in the face of such disasters, and the degree of actual harm experienced, as highlighted also below in section II.1.1 on International Law, risk and vulnerability.

5. *Personal security*: the UNDP Report highlights possibly the most basic understanding of this category of security, namely freedom from physical violence and harm, but describes different ways in which it can be produced, the plurality of actors (State and non-State, vertical and horizontal, national and transnational) from which the threat can emanate, including drug and organized crime associations and rival ethnic groups, the distinct

⁶⁹ World Health Organization, “Maternal mortality”, *op. cit.*

gender and child-related impact, and the diverse levels of exposure to injury, i.e., of vulnerability, within developed and developing societies. It also highlights industrial and traffic related accidents as sources of great danger to personal security.

Regarding the way women experience threats to their personal security, the Report stresses the heightened risk of rape in some societies such as the U.S. and emphasizes the intensified risk for women of domestic violence and violence and sexual abuse in the workplace, some of these issues dealt with in detail in Chapter III of this thesis. Considering also certain types of culturally related violence against women, the Report gives an account of organizations in India reporting 9,000 dowry-related deaths per year, a striking figure on its own and especially if we recall the 1848 newspaper reference above which gives testimony of the efforts since then to eliminate deadly harm to women.

Children were also described as increasingly exposed to abuse and neglect and likewise susceptible to violence, for example, at the time of the 1994 Report in the U.S. there were 7,000 deaths of children per year (20 per day) related to gunshot wounds. The Report also emphasized the particular vulnerability of children to violence, sexual abuse, exploitation and prostitution, often related to the poverty cycle they suffered, for instance, at the time 200,000 children spent their lives in the streets of Brazil, a shocking fact addressed in a related case by the regional human rights court as explored in section II.1.1 below (IACHR, *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*, 1999). The specific vulnerability to sexual exploitation of children for commercial purposes was later picked up in 2000 by the Protocol to the UN Convention on the Rights of the Child on the subject, so it would seem that the human security notion as a person-centered view produced an impact on this debate.

6. *Community security*: According to the Report, membership in religious, racial, ethnic, linguistic or cultural groups determines a sense of belonging and security. It signalled how with industrialization, indigenous peoples had confronted threats in their freedom of movement and in their traditional rights to communal land which affects their well-being and survival as related to access to water and other natural resources. At the same time, community practices may be oppressive and place at risk or undermine the enjoyment of human rights by certain of its members, like women or children; think for example of female genital mutilation or different voting rights for women. Precisely some of the questions regarding human rights as related to ethnically diverse groups and the construction of lack of legal immigration status as a source of racial discrimination are addressed in Chapter IV below on undocumented migrants and non-citizens.
7. *Political security*: to a certain extent the UNDP Report equates this area of human security to compliance with respect and protection of human rights. Of course, today more often than not we speak of the whole panoply of human rights and think of them as comprising civil, political and ESC Rights. This thesis defends the idea that all of them should be considered within the human security conception, as the UNSG's Second Report on Human Security of 2012 does, and only differentiated or prioritized according to identifiable and identified levels of risk and vulnerability on a context-specific basis. In this respect, the 2012 Report of the UNSG adopts a stronger legal human rights' basis to ground the idea of human security than the 1994 UNDP one did.

The position held in that year is possibly understandable, given that as the UNDP Report indicates, many parts of the world were only emerging from dictatorships that had severely affected the life and integrity of political dissidents and thus, the document wanted to underline the threats coming from the State in repressing its people. As the Report puts it, “One of the most useful indicators of political insecurity in a country is the priority the government accords military strength”, since governments sometimes use armies to repress their own people. Indeed, if a government is more concerned about its military establishment than its people, this imbalance shows up in the ratio of military to social spending on health and education (in 1980 in Iraq 8 to 1 and in Somalia 5 to 1, for example), as highlighted in the Report. This would seem to indicate that even when assimilating political security to the protection of human rights (understood as civil and political rights), in referring to the realm of health and education, the UNDP Report actually did embrace a broad vision of the rights the State should integrally respect and guarantee.

Of course each one of these forms of human security is a world in itself. Specific forms of human (in)security, the threats related to them and the affected human rights have been analysed in depth on their own footing, such as the work on environmental security⁷⁰ and food security,⁷¹ for example.

However, the scope of this thesis will rather focus in **Part 1**, on the legal expressions of some of the elements of human security in International Law and the connecting points between them, and in **Part 2**, on the concept of human security more in the line of the definition proposed by the 2003 Report *Human Security Now* and complemented by the 2012 UNSG’s *Second Report on Human Security* and its consequent endorsement by the UNGA, that is, utilized as a *framework of analysis* or a lens to review different phenomena, in the case of this thesis, to examine and better define some of its practical applications to human rights law and interpretation in the fields of violence against women and girls and undocumented migrants and other non-citizens.

I.2.1 Approaches after the 1994 UNDP Report

To continue with the evolution of the concept, it should be noted that institutional prioritization has been given to human security at the international level, for example, through the United Nations Trust Fund for Human Security (UNTFHS), created in 1999 mainly with contributions from Japan,⁷² and solely funded by the Japanese Government from 1999 to 2006. Since 2007, the Governments of Greece, Mexico, Slovenia and Thailand have also contributed to the Fund.⁷³ Another mechanism favouring human security initiatives found its path through an informal group

⁷⁰ See for example Dalby, Simon, *Environmental Security*, University of Minnesota Press, 2002, in particular, pp. 13-18; and 123-142. See by the same author, *Security and Environmental Change*, Polity Press, Cambridge, UK, 2009; see also the analysis carried out in the section on ESC Rights below with respect to the case of the ECHR, *Oneryildiz v Turkey*, of 2004.

⁷¹ See for instance the 2003 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, the Maputo Protocol, dealt with in Chapter III of this thesis.

⁷² http://www.mofa.go.jp/policy/human_secu/assistance.html

⁷³ *Human Security at the United Nations*, United Nations Trust Fund for Human Security, Human Security Unit, OCHA, New York, 2012, p. 15.

of 13 countries, the Human Security Network (HSN), also formed in 1999 and led by Canada.⁷⁴ An additional group of countries, the Friends of Human Security (FHS), headed by Japan and Mexico was created in later years, as will be described below.

The UN Secretary General also mentioned in passing human security as part of his position relating to his 1995 *An Agenda for Peace*, once the concept had already been articulated in detail in the 1994 UNDP Human Development Report, and underlined the need for a participatory and inclusive process. It pointed out that all the efforts of UN bodies to control and resolve conflicts need the cooperation and support of other players on the international stage: “the Governments that constitute the United Nations membership, regional and non-governmental organizations, and the various funds, programmes, offices and agencies of the United Nations system itself. If United Nations efforts are to succeed, the roles of the various players need to be carefully coordinated in an integrated approach to *human security*”.⁷⁵

The fact that human security was considered within the chapter of Coordination of the document seems to suggest it was also viewed as part of a model of institutional cooperation, apart from an idea with a potential to transform the content of security conceptions within the Security Council and the UN in general. The focus on coordination would appear to have transcended to the current positioning of the Human Security Unit within the UN Office for the Coordination of Humanitarian Affairs (OCHA).⁷⁶

In the realm of International Law, the successes attributed to the human security agenda by the governments and activists that support it, include the agreement of the 1997 Landmine Ban Treaty, also known as the Ottawa Convention, not by chance promoted by and signed in Canada, one of the main human security advocates. References of compliment have also been made to the adoption of the 1998 Rome Statute and the following creation of the International Criminal Court as sharing and concretizing the human security ideal.⁷⁷

⁷⁴ The Human Security Network is a group of 13 countries –of which Japan is not a part- united informally to jointly promote in various international forums, including the current Human Rights Council, a series of actions in the name of human security. The Network includes Austria, Canada, Chile, Costa Rica, Greece, Ireland, Jordan, Mali, the Netherlands, Norway, Switzerland, Slovenia, Thailand and South Africa as an observer. This Network promotes issues such as the universalization of the Ottawa Convention on Anti-personnel Landmines (a treaty which was adopted in 1997 due in part to the active promotion of several NGOs and the Human Security Network itself), the establishment of the International Criminal Court, the protection of children in armed conflict, the control of small arms and light weapons, the fight against trans-national organized crime, human development and human security, human rights education, the struggle against HIV/AIDS, addressing implementation gaps of international humanitarian and human rights law, and conflict prevention. It can be observed that for these countries, there is a more obvious interrelation between the idea of human security with International Human Rights Law and International Humanitarian Law, <http://www.humansecuritynetwork.org/network-e.php>.

⁷⁵ Report of the Secretary-General on the work of the organization, supplement to an agenda for peace: Position Paper of the Secretary-General on the occasion of the fiftieth anniversary of the United Nations, A/50/60 - S/1995/1, 3 January 1995, para. 81.

⁷⁶ When asked about the reasons for locating the human security area in such Office, Ms. Mehnraz Mostafavi from OCHA, asserted it was because of the prioritization of coordination within the human security ideal that the unit was placed in the office responsible for coordination issues within the UN. Interview carried out on April 8, 2011.

⁷⁷ See Edwards, Alice, “Human security and the rights of refugees: transcending territorial and disciplinary borders”, in *Michigan Journal of International Law*, Vol. 30, no. 3, 2009, pp. 772-773. See also Alcalde Villacampa, Javier, “The Mine Ban Treaty, New Diplomacy and Human Security Ten Years Later”, Book reviewed: Williams, Jody, Mary Wareham and Stephen Goose (editors), *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security*, New York Roeman and Littlefield, 2008, 348pp., in *European Political Science* 7:4, 2008, pp. 519-529; and more generally Anderson, Kenneth, “The Ottawa Convention Banning Landmines, the Role of International Non-

In fact, this tendency finds its origins in previous efforts, even in Cold War period. Confronted with the prevailing logic of armament as a way of protecting and ensuring State security, under UN leadership, some States opted for the construction of an alternative understanding of security precisely through disarmament. Thus, the path to being authentically secure is to disarm, rather than to enhance and develop military potential. As it has been noted, “Operating in a world perilously close to a devastating nuclear confrontation forced the organization to develop innovative and creative solutions to seemingly intractable problems, such as limiting the threats posed by the nuclear arsenals stockpiled by each superpower. The UN’s role in disarmament led to the establishment of standards such as the Nuclear Non-Proliferation Treaty (1968), the Anti-Ballistic-Missiles Treaty (1972), the Biological Weapons Convention (1972) and the Chemical Weapons Convention (1993)”.⁷⁸ Since the principal targets of these weapons were communities and, by extension, individuals, it could be argued that even when States were the principal subjects bound to action, individuals and communities were ultimately the main beneficiaries of these UN-led initiatives. As will be described, the human security idea has also impacted the development of the trade arms and small arms and light weapons (SALW) legal regimes at the regional levels and, according to some, human security has generally improved in the last decade due to such advancements in the relevant legal frameworks.⁷⁹

Turning back to the evolution of human security in its modern form, in the United Nations Millennium Summit in 2000, UN Secretary-General Kofi Annan called upon the world community to advance the twin goals of “freedom from want” and “freedom from fear”. As a contribution to this effort, an independent Commission on Human Security (CHS) was established in 2001 and integrated by a group of experts co-chaired by academic Amartya Sen, Nobel Laureate in Economics 1998, and Sadako Ogata, former UN High Commissioner for Refugees. After two years of deliberation, the Commission submitted its final report, *Human Security Now*, to the UN Secretary-General in May 2003.

The 2003 Report by the CHS, which also draws upon the original positions surrounding the UN creation with reference to *freedom from fear* and *freedom from want*,⁸⁰ provides the following definition:

governmental Organizations, and the Idea of International Civil Society”, in *European Journal of International Law*, Vol. 11 No. 1, 2000, pp. 91-120. References to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, adopted on September 18, 1997, 2056 U.N.T.S. 241 and the Rome Statute of the International Criminal Court, adopted on July 17, 1998, 2187 U.N.T.S. 90.

⁷⁸ UNDP, *The Human Security Framework and National Human Development Reports*, National Human Development Report Series, NHDR Occasional Paper 5, by Richard Jolly and Deepayan Basu Ray (Institute of Development Studies, Sussex), United Nations Development Programme, Human Development Report Office, National Human Development Report Unit, New York, May 2006, p. 3.

⁷⁹ In this sense, see Garcia, Denise, *Disarmament diplomacy and human security: regimes, norms, and moral progress in international relations*, Routledge, New York, 2011.

⁸⁰ Commission on Human Security, *Human Security Now*, New York, Commission on Human Security, 2003. It has been noted that the original UN objectives were formulated on the basis of the US President Franklin Roosevelt’s position on “the four fundamental freedoms” [freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear]; see Benedek, Wolfgang, “Human security and human rights interaction”, in Goucha, Moufida and John Crowley (editors), *Rethinking Human Security*, Wiley-Blackwell and UNESCO, United Kingdom, 2008, p. 7. Following this train of thought, the Universal Declaration of Human Rights (promoted notably by Eleanor Roosevelt) sets forth in its Preamble that “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and *freedom from fear and want* has been proclaimed as the highest aspiration of the common people”.

Human security means to protect the *vital core of all human lives* in ways that enhance human freedoms and human fulfillment. Human security means protecting fundamental freedoms—freedoms that are the essence of life. It means protecting people from *critical (severe) and pervasive (widespread) threats* and situations. It means using processes that build on people’s strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of *survival, livelihood and dignity*.⁸¹

It also proposes that human security is realized by joint strategies: 1) of *protection*, by crafting norms, institutions and processes that protect and advance human security, including the establishment of early-warning mechanisms, good governance and social protection instruments (top-down strategy); and 2) of *empowerment*, by building on people’s perceptions of the risks they face and ensuring participatory processes that allow for individuals’ roles in defining and implementing their essential rights, freedoms and responsibilities (bottom-up strategy).⁸² In dealing with this second key to human security, the Report emphasizes an additional category to freedom from fear and from want, given that *empowerment* means enabling people to exercise the “freedom to act on one’s own behalf – and on behalf of others”.⁸³ As Sadako Ogata has put it, “People protected can exercise choices. And people empowered can make better choices”.⁸⁴

The Report also stresses that State security and human security are complementary, given that the latter addresses insecurities that have not been considered as State security threats.⁸⁵ This of course may come off as wishful thinking in cases where the State itself is directly the source of danger for people, or when State policy or practice, the bilateral or regional arrangements among States, or the global setting as a whole, construct vulnerability towards certain persons or groups, such as undocumented migrants or asylum seekers, as will be analysed in Chapter IV below.

The CHS report refers to threats coming from violence in its traditional meaning as conflict deriving from the use of armed force, but also from poverty, ill health, illiteracy and other maladies, and highlights the fact that conflict and deprivation are interconnected.⁸⁶ However, the CHS underlines abrupt change as a risk to security, rather than absolute levels of deprivation, for example, in the case of “sudden economic downturns”.⁸⁷ Many threats affect people at all levels—the affluent as well as the poor, for example, environmental hazards and lack of water⁸⁸ or the spread of HIV/AIDS, which is high in poor countries, as well as in countries in transition to

⁸¹ *Human Security Now*, *op. cit.*, p. 4. Emphasis added.

⁸² *Ibid.*, pp. 10-11. See also *Human Security at the United Nations*, United Nations Trust Fund for Human Security, Human Security Unit, OCHA, New York, 2012, p. 5.

⁸³ *Human Security Now*, *op. cit.*, pp. 10-11.

⁸⁴ Ogata, Sadako, “Empowering people for human security”, Presentation at the 56th Annual DPI/NGO Conference, (no date), p. 6, available at <http://www.un.org/dpi/ngosection/annualconfs/56/ogata.pdf> See also the recent position by the G8 in relation to health, in “Toyako Framework for Action on Global Health: Report of the G8 Health Experts”, Group G8 Summit, Hokkaido Toyako Summit, Toyako, Japan, July 8, 2008, at P.P. 8: “In addressing global health challenges, the *human security perspective* focusing on *protection* and *empowerment* of individuals and communities is critical, given that the health challenges directly affect human dignity and, in the words of the preamble to the World Health Organization Constitution, the right to the highest attainable standard of health, which is one of the fundamental human rights of every human being”. Emphasis added.

⁸⁵ *Human Security Now*, *op. cit.*, pp. 1, 4 and 10. Quote taken from p. 4.

⁸⁶ *Ibid.*, *Outline of the Report*, p. 1.

⁸⁷ *Human Security Now*, *op. cit.*, Box 1.3 “Development, rights and human security”, p. 8.

⁸⁸ *Ibid.*, pp. 15-19.

democracy and market economies.⁸⁹

In shifting the focus away from traditional State-centered views and acknowledging a wide range of public and private actors -individuals, social groups, businesses, organizations and local communities-, human security also overcomes the dichotomous classifications of developed and developing nations “recognizing that prosperous and secure citizens living in Cape Town may have more in common with similar citizens in Sydney, Santiago and Stockholm, than with their countrymen in Johannesburg, Durban and Pretoria”.⁹⁰ While highlighting such cross-cutting parallels and uncovering threats affecting both to the affluent and the poor, the 2003 CHS Report does, however, note that among other factors that may condition exposure to threats, such as gender, age, or ethnicity, people in a situation of poverty or marginalization are in a higher level of risk and vulnerability to confront these threats.⁹¹ Indeed, with the break-down of the dual categorization (for some a triple division into “First, Second and Third World”) reduced to State frontiers and their corresponding degrees of development, human security also helps identifying similarities in risks affecting rich, middle-class, disenfranchised people worldwide, within and across territorial frontiers, and at the same time, places particular emphasis on individual or collective elements that heighten people’s condition of vulnerability.

In a more straightforward way, this other set of forces related to poverty and also ill-health have been termed “structural violence”,⁹² and more recently “indirect violence”, in the sense that they represent threats as real and dangerous to people’s life and personal integrity as the use of armed force; even a much higher risk in terms of statistical probability if one reviews the numbers of deaths resulting from *direct violence* in comparison to those deriving from *indirect violence*.⁹³

To relate these different forms of violence that may be included in the human security idea to the legal discourse and practice of human rights, let us look at the way the relationship between human security and human rights has been conceived. The CHS Report affirms that

...*human rights* and the attributes stemming from human dignity constitute a normative framework and a conceptual reference point which must necessarily *be applied to the construction and putting into practice of the notion of human security*. In the same manner, without prejudice to considering the norms and principles of *international humanitarian law* as essential components for the construction of *human security*, we emphasize that the latter [human security] cannot be restricted to situations of current or past armed conflict, but rather is a *generally applicable instrument*.⁹⁴

⁸⁹ *Ibid.*, p. 96.

⁹⁰ Inglehart, Ronald F. and Pippa Norris, “The Four Horsemen of the Apocalypse: Understanding Human Security”, The 2011 Johan Skytte Prize Lecture, in *Scandinavian Political Studies*, Volume 35, Issue 1, 2012, p. 75.

⁹¹ This is very notable in the issue of health. To give an illustrative example, the CHS Report, based on World Health Organization estimates, from the total number of deaths due to disease each year, 40% of them were avoidable. Within that second universe, “Many avoidable deaths—especially those due to infectious diseases, nutritional deprivations of children and maternity related risks of unsafe childbearing and childrearing—can be prevented only by reaching people trapped in poverty or conflict. This gap in avoidable deaths is due to *differences in risks and vulnerabilities* and in access to modern health knowledge and care”, *Human Security Now*, *op. cit.*, p. 95. Emphasis added.

⁹² See Galtung, Johan, *Peace: Research, Education, Action*, Ejilens, Copenhagen, 1975.

⁹³ See the table presented in Roberts, David, *Global Governance and Biopolitics: Regulating Human Security*, Zed Books, London, 2010, p. 14.

⁹⁴ *Human Security Now*, *op. cit.*, p. 145. Emphasis added.

Certainly, some authors identify a certain historical connection between the rules of armed conflict and modern views of human security. Given the prohibition of causing unnecessary human suffering within armed conflict pursued by international humanitarian law (IHL), “[t]he concept of human security today could be seen as a logical development of the basic principles enunciated in the Hague Conventions of 1899 and 1907”, generally regarded as precursors to modern IHL.⁹⁵ On the other hand, this section gives testimony to the more recent trend of the UN debate on human security that revolves around the broader goal of realizing the triangle of security, development and human rights, not limited to the context of armed conflict.

As the 2003 CHS Report *Human Security Now* puts it, “*Human security complements human development* by deliberately focusing on *downside risks*. It recognizes the conditions that menace survival, the continuation of daily life and the dignity of human beings... Human security helps identify the rights at stake in a particular situation. And *human rights* help answer the question: How should human security be promoted.”⁹⁶

It must be noted, though, that in advancing its findings, the CHS Report focused more on the factual situations valued as threats for persons –e.g. lack of food, HIV/AIDS, intra-State violence-, than on a normative diagnosis of the condition of enjoyment of the related human rights in a given society–i.e. state of the right to food, right to life and to health, and right to personal integrity- and the risks faced for the protection of such rights. This gives evidence, it is submitted, of the need and usefulness of the proposals of the present thesis.

Two years after the CHS Report, in 2005, former UN SG Kofi Annan, issued the report *In larger freedom: towards development, security and human rights for all*, as a guideline for the global reforms needed to face the pressing challenges of today, and referred to similar and interrelated worldwide threats. The report recovers the original idea of a ‘larger freedom’ referred to in the Preamble of the United Nations Charter of 1945, and places the concepts of freedom from fear and freedom from want, emphasized both in the 1994 UNDP report and in the 2003 CHS report, in the current world scenario:

The threats to peace and security in the twenty-first century include not just international war and conflict but *civil violence*, organized crime, terrorism and weapons of mass destruction. They also include *poverty*, deadly infectious disease and environmental degradation since these can have equally catastrophic consequences...On this interconnectedness of threats we must found *a new security consensus* ...[W]hatever *threatens one threatens all*. Once we understand this, we have no choice but to tackle the whole range of threats. We must respond to HIV/AIDS as robustly as we do to terrorism and to *poverty as effectively as we do to proliferation*. We must strive just as hard to

⁹⁵ Anastassov, Anguel, “Are nuclear weapons illegal? The role of public international law and the International Court of Justice”, in *15 Journal of Conflict and Security Law* 65, Oxford University Press, Spring 2010, p. 71. The reference is to the Hague Peace Conferences from which the following treaties were adopted, both focusing broadly on the laws of war and war crimes in international law and building on the Geneva Convention of 1864: The Hague Convention signed 29 July 1899, entered into force on September 4, 1900, dealing mainly with disarmament efforts, and the creation of the Permanent Court of Arbitration (of voluntary acceptance, although the original intention had been to create a binding international body for pacific dispute settlement); and the Hague Convention of 1907, Final Agreement signed on October 18, 1907, and entered into force on January 26, 1910, on attempting to found a binding international court of arbitration and failing, thus broadening voluntary arbitration mechanisms and further developing the 1899 Convention, especially regarding maritime warfare.

⁹⁶ *Human Security Now*, *op. cit.*, p. 10. Emphasis added.

eliminate the threat of small arms and light weapons as we do to eliminate the threat of weapons of mass destruction. Moreover, we must address all these threats *preventively*, acting at a sufficiently early stage with the full range of available instruments.⁹⁷

It is worth noting that this report includes a third pillar, in addition to freedom from fear and from want, that of *freedom to live in dignity*, under which it deals with the rule of law, human rights and democracy.⁹⁸

Notably, the UN General Assembly (UNGA) in the same year in the context of the *2005 World Summit Outcome*, in paragraph 143, titled ‘Human Security’, recognized

the *right* of people to live in freedom and dignity, free from poverty and despair. We recognize that all individuals, *in particular vulnerable people*, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential.

To this end, it committed to discussing and defining the notion of human security in the General Assembly.⁹⁹ Based on this paragraph, the Friends of Human Security (FHS), promoted by Japan and Mexico, was created as an open-ended informal platform for Member States and UN organizations to discuss human security related themes and reach a ‘common understanding’ on the term.¹⁰⁰

Different organizations also endorsed the view of a triangular relationship between security, development and human rights, stressed by the human security notion. The *Geneva Declaration on Armed Violence and Development*, formed in 2006, endorsed by different countries as well as by inter-governmental and international organizations, among them the Organization for Economic Cooperation and Development (OECD), “calls upon States to achieve measurable reductions in the global burden of armed violence and tangible improvements in *human security* by 2015”.¹⁰¹ To achieve this goal the Geneva Declaration has carried out specific work on violence against

⁹⁷ Report of the United Nations Secretary General, *In larger freedom: towards development, security and human rights for all*, A/59/2005, March 21, 2005, paras. 78-81. Emphasis added.

⁹⁸ Thus, it is interesting to note that the structure of the 2005 Secretary General’s Report reflects the conceptual links the UN is making with these goals and principles. Conversely, the CHS Report doesn’t specifically refer to freedom to live with dignity, although as was mentioned, it does indicate that human security entails the creation of conditions to give people the building blocks of “survival, livelihood and *dignity*”.

⁹⁹ Para. 143 of the *2005 World Summit Outcome*, UN General Assembly, A/RES/60/1, 24 October 2005. Emphasis added.

¹⁰⁰ This platform works in a parallel way to other existing settings such as the Human Security Network, already mentioned above. The FHS in particular aims at this advancement of a common understanding of human security and engages in collaborative efforts to further mainstream human security in UN activities; see http://www.mofa.go.jp/policy/human_secu/friends/index.html.

¹⁰¹ Actually the OECD employs a broad understanding of security which encompasses violence against women (VAW), in line with some of the human security concerns raised in Chapter III of this thesis: “When husbands are killed, *women* frequently lose their access to farmlands and the right to live in their marital homes. The resulting *survival choice* for many affected women and children is prostitution, commercial labour or domestic servitude. This has consequences for *ongoing exposure to violence and ill health* from communicable diseases and poor working conditions, as well as future community exclusion”, OECD, *Armed Violence Reduction: Enabling Development*, OECD, Paris, 2009, p. 32. Emphasis added. The OECD also adopts a “contextual appraisal toolkit for implementing VAW interventions” (p. 51); available at http://www.oecd.org/document/34/0,3343,en_2649_33693550_42281877_1_1_1_1,00.html.

women¹⁰² and has issued its general flagship reports on the *Global Burden of Armed Violence* emphasizing the highly gendered causes and consequences of the phenomenon, as analysed in Chapter III of this thesis.

Turning back to the UN realm, as a result of the World Summit of 2005, in addition to all the work done on human security throughout various UN programs, funds and agencies (A/62/695, annex), in May 2008, the UNGA convened an informal thematic debate on human security, by which general consensus was reached in the sense that a more comprehensive and people-centered approach towards threats is needed in today's world. Thus, the Secretary General Ban Ki-moon issued his *Report on Human Security* in March 2010 (A/64/701), after which a formal debate was held in the UNGA in May 2010 and a resolution adopted in July 2010, *Follow-up on the implementation of paragraph 143 on human security of the 2005 World Summit Outcome* (A/RES/64/291).

In December 2010, the UN Secretary General appointed Mr. Yukio Takasu, former Ambassador of Japan to the UN, as Special Adviser on Human Security, with the tasks of conducting close consultations with Member States, UN system organizations and other stakeholders to facilitate the achievement of a common understanding on the notion of human security and of coordinating his activities with the UN Human Security Unit located within the UN Office for the Coordination of Humanitarian Affairs (OCHA).

To implement resolution A/64/701, the General Assembly, under the coordination of its President and of Special Adviser Yukio Takasu, convened an informal thematic debate with a panel of experts to address these issues in an interactive dialogue with Member States, on April 14, 2011. From this exchange, it could be gathered that a broad understanding of human security for the most seemed to provoke general agreement between States,¹⁰³ and this was, in fact, the view confirmed by the 2012 UN SG's Report, as will be studied.

At the same time, the role that human security has played in re-shaping the UN collective security debate and UN Security Council actions taken thereby, has also been studied, and to a certain extent equating collective human security to the obligation of conflict-*prevention* and to protection of civilians during armed conflict.¹⁰⁴ Some expressions of the human security impact on collective security at the regional level of the African Union will also be mentioned in Chapter II.

¹⁰² See Geneva Declaration, "Tackling Violence against Women: From Knowledge to Practical Initiatives", Working Paper by Milliken, Jennifer with Elisabeth Gilgen and Jasna Lazarevic, Geneva Declaration Secretariat, Geneva, 2011.

¹⁰³ UN General Assembly, informal thematic debate held on April 14, 2011, in implementing GA Resolution A/64/291 of July 2010. During the debate, States expressed consensus on this view and some like Pakistan, Costa Rica, Brazil and Thailand specifically highlighted the importance of maintaining ESC Rights inside the scope of the human security approach. Moreover, some of the experts of the panel, like Sonia Picado, Amitav Acharya and Andrew Mack, portrayed the idea that a very flexible definition would be necessary in order not to reduce the possibilities of practical action of human security. It was pointed out as well that the lack of unanimous consensus up to that moment had not been an obstacle to implement dozens of projects under human security without a strict definition (personal record taken at the informal debate).

¹⁰⁴ Nasu, Hitoshi, "The Place of Human Security in Collective Security", in *Journal of Conflict and Security Law*, Oxford Journals, first published online September 25, 2012. The article examines how the idea of human security has informed the operation of the UN collective security system and to what extent jurisdictional, normative and operational challenges to the Security Council have been addressed in dealing with human security issues within its legal framework. See also by the same author "Operationalizing the 'Responsibility to Protect' and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict", in *Journal of Conflict and Security Law*, No. 14 (2), Oxford University Press, 2009, p. 215.

However, the notion that seems to hold more promise under the ‘common understanding’ of human security, proposed in 2012, is that of a working alliance favouring cooperative schemes at inter-governmental and civil society level to tackle complex threats -often related to development and socio-economic factors as well as to a broader conceptualization of violence- and build resilience to confront them,¹⁰⁵ as addressed in the central focus of this thesis. This could eventually include UN Security Council action, although in a more secondary place, for example, though peace-keeping and peace-building operations, but it discounts any possibility of military intervention to foster human security goals, an option that was carefully and explicitly excluded in the UN Secretary General’s Report of 2012 and endorsed thereof by the UNGA, as will be reviewed.

I.2.2 Human security and humanitarian intervention

Before turning to the detailed content of the UNSG’s Report of 2012, some words should be reserved for the relationship between human security and humanitarian intervention, more concretely through the concept of the responsibility to protect. The World Summit of 2005 had actually proposed for the UNGA to discuss two concepts: that of Human Security and that of Responsibility to Protect (R2P), this last one envisioned in 2001 as a reinterpretation of sovereignty and a criteria setter for humanitarian intervention in the cases of certain large-scale humanitarian crises: 1) genocide, 2) ethnic cleansing, 3) war crimes and 4) crimes against humanity.¹⁰⁶ In many scenarios, it is the polemic concept of R2P which has captured much attention because of its political implications, especially in the light of the latest happenings in Libya and Syria,¹⁰⁷ though it must not be forgotten that this is only one of the proposals of grounding a principled and legally valid foundation of humanitarian intervention, coherent with

¹⁰⁵ See for example The Civil Society Network for Human Security as an initiative set up by the Dutch development organisation Cordaid and the Global Partnership for the Prevention of Armed Conflict (GPPAC), a member-led network of civil society organisations active in the field of conflict prevention and peace-building across the world. The platform brings together civil society organizations from fields such as peace-building, development and human rights that have been working in realities of violent conflict, repression and censorship, among others, Human Rights Watch, Human Rights First, Global Network of Women Peacebuilders and West Africa Network for Peacebuilding, at <http://www.humansecuritynetwork.net/organisations>

¹⁰⁶ See *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty (ICISS), New York, December 2001. As is well known, this position proposes a different content for the concept of sovereignty of the State as a ‘responsibility to protect’ individuals. The ICISS, established by the Government of Canada in September 2000 and supported by former UN Secretary General, Kofi Annan, forwarded the idea that the protection of individuals through humanitarian intervention by collective action of the international community, via the channels foreseen in the UN Charter, is required as a last resort in cases of certain mass atrocities –genocide, ethnic cleansing, crimes against humanity, and war crimes- in order to prevent further violations or to face the ones already taking place. The R2P proposal, further developed and detailed in UN Secretary General’s Report of 2009, specifies that responsibility may and should be carried out in cases where the State primarily exercising jurisdiction is unwilling or unable to protect its people; UN General Assembly, *Implementing the responsibility to protect : report of the Secretary-General*, A/63/677, 12 January 2009.

¹⁰⁷ See for instance *R2P: The Next Decade*, The Stanely Foundation, 2012. On January 18, 2012, the Stanley Foundation, the Carnegie Corporation of New York and the MacArthur Foundation convened an event on R2P to consider “the evolving global dynamics that will frame, drive, and challenge policy development in the years ahead”. Attendants included the UN’s Secretary-General Ban Ki-moon; members of the ICISS; international, regional, and national officials; academic and policy experts; civil society figures; and journalists.

Due to the somewhat parallel historical development of human security and R2P in the international arena, and their shared people-centered approach towards protection from severe threats and critical destructive harm to human beings, the relationship between certain cases of human insecurity and humanitarian intervention might come to mind.¹⁰⁹ It is true as well that under a narrow definition of human security, a case of mass repression may lead to thinking of an R2P scenario, much more than a case of mass starvation, although both are genuine human security concerns in the same degree. There is another way, though, of understanding the relationship of human security to humanitarian intervention, appointing towards the first as a normative reference point for the second. For a certain viewpoint, the connotations of the phrase “Human Security” provide what human rights and humanitarian law do not, namely a normative basis for condemning even “legitimate” recourse to force, legitimate in the sense that it is defensive or has been authorized by the Security Council under Chapter 7 of the United Nations Charter. They also provide a normative basis for indicting tactics and strategies arguably allowed by humanitarian law. This normative basis is not, however, new in substance. Rather it is the old wine of the Just War doctrine in a new bottle”.¹¹⁰

A deeper analysis of humanitarian intervention, *ius bellum* and *ius bello* is not in point with the central focus of this thesis. What must be clearly pointed out, though, is that the examination carried out throughout this text reveals that actually the literature and official documents over the years dealing with human security -at the UN as well as the regional levels-, have not approached the hypothetical human security-humanitarian intervention link in a significant manner (except possibly in the case of the African Union), perhaps because of two reasons.

One, the debate on the link between mass human rights violations and military intervention for humanitarian purposes, has been dominated in the political agenda and in academic examination mostly by the concept of R2P. And secondly, it is understandable that human security has not been primarily considered in this debate, in light of its pacifist vocation since its initial conceptualization: in none of its foundational documents or practical applications at the UN level, has human security been used as a trigger or justification for military intervention. Quite the contrary, because of its emphasis on all types of vulnerabilities that affect people’s human rights and impede them from living both free from fear and free from want, human security seeks to create the conditions necessary to eliminate or ameliorate such risk situations and build resilience to confront them, not only as valuable goals in their own right, but also to *prevent* them from escalating to a situation of physical violence or use of armed force, whether locally, nationally or internationally. Of course critical human insecurity may well be the background curtain against which certain scenarios of widespread human suffering develop. Grave and systematic violations of human rights may lead to considerations for the need of humanitarian intervention that, according to R2P, would be carried out only in the very limited cases of the four mentioned situations. But when this occurs, *human security has failed*.

¹⁰⁸ For an alternative view that challenges the R2P as the appropriate notion to guide humanitarian intervention and proposes equity as a grounded legal principle adequate to orient the international community’s decisions in this field, see Burke, Ciarán, *The Equitable Theory of Humanitarian Intervention*, PhD Thesis in Law, European University Institute, Florence, 2011.

¹⁰⁹ Glusac, Luka, “Humanitarian Interventions in the Concept of Human Security”, in *Western Balkans Security Observer*, No. 16, January-March 2010, pp. 80-92.

¹¹⁰ Farer, Thomas, “Human Security: Defining the Elephant and Imagining its Tasks”, in *Asian Journal of International Law*, Volume 1, Issue 01, January 2011, at p. 49.

As Hilary Charlesworth put it since 2002, under alternative visions “security would mean the absence of violence and economic and social justice. If the idea of security is understood more broadly, the futility of the standard form of international collective action becomes clear. Military intervention is an inappropriate mechanism if the causes of insecurity are poverty, discrimination and violence protected by structures within the state”.¹¹¹

The narrative of thinking strictly in terms of the liberal binary R2P/military intervention and human security/development activities has been further contended.¹¹² In fact, the most recent report by the Secretary General presented to the UNGA last April 2012, explains at length the distinction between the two, mostly working towards leaving clear that human security is not related to the use of armed force or any type of interventionist agenda.¹¹³ This Second Report of the UN Secretary General on Human Security, prepared on the basis of the discussions held in the oral formal and informal meetings convened by the UNGA, and coordinated by the UN SG’s Special Adviser on Human Security, as well as the written submissions sent by States, and the subsequent endorsement of the general terms of the report by the UNGA in October 2012, all confirm the conceptual and political differences between human security and R2P. Such documents also reflect the interest of States in delinking human security from any possibility of humanitarian intervention or as a foundation for legitimizing reactive measures involving armed force, and rather viewing it as a *constructive and preventive tool*. Indeed, the Report specifically differentiates:

Human security *does not entail the threat or the use of force* and is implemented with full respect for the purposes and principles enshrined in the Charter of the United Nations, including full respect for sovereignty of States, territorial integrity and non-interference in matters that are essentially within the domestic jurisdiction of States...*the notion of human security is distinct from the responsibility to protect* and its implementation. While human security is in response to *multidimensional insecurities* facing people, the responsibility to protect focuses on protecting populations from *specific cases* of genocide, war crimes, ethnic cleansing and crimes against humanity. As such, human security has *broader application*, bringing together the three pillars of the United Nations system, whereas the responsibility to protect *centres* on the aforementioned situations.¹¹⁴

Apart from clarifying what human security is *not*, more importantly the 2012 UNSG Report and its acceptance by the UNGA reflect the current momentum on the ‘common understanding’ among Member States of the notion of human security and its implications, as will be detailed below.

I.3 Critiques towards the human security approach

In the realm of the more general debate, it must also be flagged that there have been several

¹¹¹ Charlesworth, Hilary, “International Law: A Discipline of Crisis”, in *Modern Law Review*, Volume 65, Issue 3, 2002, pp. 391-392.

¹¹² See Chandler, “Resilience and human security: The post-interventionist paradigm”, in *Security Dialogue*, No. 43 (3), 2012, at pp. 213-214.

¹¹³ *Second Report of the UN Secretary General on Human Security*, UN General Assembly, A/66/763, 5 April 2012, “Follow-up to General Assembly resolution 64/291 on human security. Report of the Secretary General”.

¹¹⁴ *Ibid.*, paras. 22 and 23. Emphasis added.

questions and criticisms drawn in relation to the notion of human security as being too broad and vague to be useful in practice.¹¹⁵ Some authors contend that the extensiveness of the potential range of threats which could be included under this notion reduces its precision and utility. If all issues become a matter of ‘security’ –from food security to environmental security, political security and economic security– then the word loses its core meaning and simply becomes a rhetorical assembling claim.¹¹⁶

It has also been argued that human security is not as radically different or new as purported. Indeed, for some the human security discourse has been co-opted by the dominant security discourse. For David Chandler, human security’s “integration into the mainstream of policymaking has reinforced, rather than challenged, existing policy frameworks...in the post-Cold War world, human security approaches have been easily – and willingly – integrated into the mainstream because they have sought to ...exaggerate new post-Cold War security threats, ...[and] locate these threats in the developing world.”¹¹⁷

However, it must be noted that Chandler some years later reformulated this position and currently argues in favour of human security as the basis for post-interventionist frameworks based on the *preventive* practices of the 2000’s in building *resilience* and advancing empowerment through placing the accent on *agency* of the vulnerable persons themselves -as opposed to the liberal internationalist position on intervention of the 1990’s which privileged sovereign agency in *protective* actions of persons viewed as passive victims.¹¹⁸

It has also been argued that human security is an idea susceptible to be abused in detriment of some of the most vulnerable persons, such as refugees (especially in the light of post-9/11 security discourse),¹¹⁹ and indeed in some cases, it has.¹²⁰ In the same sense, analysis of the expansion of the notion of human security has suggested that an incremental conception of security may place migrants and alien culture as a threat to the values of national unity and national identity,¹²¹ as will be explored with further detail in Chapter IV of this thesis.

It is true that the notion of “risk” is based on the interpretation of a set of empirical facts as

¹¹⁵ For a provocative call for reflection, see Tadjbakhsh, Shahrbanou, who introduced seven challenging questions on the notion of human security on September 13, 2005 at the “Human Security: 60 minutes to Convince” discussion held at UNESCO; at http://www.peacecenter.sciences-po.fr/pdf/unesco_13-09-05.pdf.

¹¹⁶ In this sense, see Paris, Roland, “Human Security: Paradigm Shift or Hot Air?”, in *International Security*, 26(2), 2001, pp. 87–102.

¹¹⁷ Chandler, David, “Review Essay: Human Security: The Dog That Didn’t Bark”, in *Security Dialogue*, No. 39, 2008, Sage Publications, p. 428.

¹¹⁸ See Chandler, David, “Resilience and human security: The post-interventionist paradigm”, *op. cit.*, pp. 213-229.

¹¹⁹ Freitas, Raquel, “Human Security and Refugee Protection after September 11: A Reassessment”, in *Refugee: Canada’s periodical on refugees*, Vol. 20, No. 4, 2002, pp. 36 and 37.

¹²⁰ For example, the Philippines’ Human Security Act of 2007, i.e. the recent counter-terrorism legislation, contains provisions contrary to human rights’ protection; see UN Human Rights Council, “Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances”, Advanced Unedited Version, A/HRC/13/42, 26 January 2010, para. 193. See also UN Committee Against Torture, Concluding Observations on Philippines, 12 May, 2009, CAT/C/SR.887 and 888, para. 13.

¹²¹ Møller, Bjørn, “National, Societal and Human Security. A General Discussion with a Case Study from the Balkans”, Paper for the First International Meeting of Directors of Peace Research and Training Institutions on *What Agenda for Human Security in the Twenty-first Century?*, UNESCO, Paris, 27-28 November 2000, p. 11.

constituting danger, and in that sense security is an ‘inter-subjective phenomenon’ rather than a distinctively or exclusively objective condition. Because it relies heavily on perceptions of safety and well-being, which are socially constructed, it can be used by different societal and power groups in destructive ways. However, the languages of human rights or human development, for example, have also been used in ways which in fact challenge the underlying values of such concepts and may have a negative effect on their fulfilment, which does not seem as a strong enough reason to abandon these concepts.¹²²

On a more constructive note, one can underline that the contribution of human security reside in having successfully moved away the focus, at least in some aspects, from State-centered conceptions of national security to people-centered considerations of security.¹²³ In this context, human security has also been used over the years as a tool to promote State and nation-building from a person-focused perspective in some of UNDP’s regional and national reports, interestingly enough in those referred to the Middle East and the Arab region, if one thinks of the recent revolutionary political transformations precisely in the Middle East and the predominantly Arab region of North Africa.¹²⁴

Numerous relevant consequences in terms of development and the enjoyment of human rights may be thought of when viewing human security as constructed on the ideas of freedom from fear, freedom from want and freedom to live in dignity, as related to the three pillars of survival, livelihood and dignity,¹²⁵ especially if one considers statehood as a necessary prerequisite for the respect for human rights and their legal justiciability, in light of the fact that in the current international legal structure, the State still remains the primary duty-bound subject in charge of the

¹²² See MacFarlane and Foong Khong, *op. cit.*, in particular Chapter I, “The prehistory of human security”; and Freeman, Michael, “Beyond capitalism and socialism”, in *Human Rights and Capitalism. A Multidisciplinary Perspective on Globalisation*, edited by Janet Dine and Andrew Fagan, United Kingdom, Edward Elgar, 2006, pp. 3-27.

¹²³ See Owen, Taylor, “Human Security-Conflict, Critique and Consensus: Colloquium Remarks and a Proposal for a Threshold-Based Definition”, in *Security Dialogue*, Vol. 35, No. 3, International Peace Research Institute, Oslo, Norway, Sage Publications, 2004, pp. 373-387.

¹²⁴ See UNDP, *Arab Human Development Report 2009: Challenges to Human Security in Arab Countries*, UNDP, Regional Bureau for Arab States, New York, 2009, and UNDP, *Human Development Report 2009/10, occupied Palestinian territory: Investing in Human Security for a Future State*, 2010. See also the 2004 National Human Development Report on Afghanistan, *Security with a Human Face: Challenges and Responsibilities*, UNDP, 2004.

¹²⁵ UNDP, *Human Development Report 2009/10, occupied Palestinian territory: Investing in Human Security for a Future State, op. cit.*, p. 13. The Report builds on the threats indicated in the 1994 UNDP Report and on the concept and strategies expressed in the 2003 CHS Report, when it affirms that “human insecurity is the result of pervasive, recurrent or intense threats, and can only be remedied by the protection and empowerment of people. While the human security paradigm places a concern with human life and dignity at the fore, it is...the rearguard of human development”. The Report “explores the facets of human security (economy, food, health, environment, political, personal, community) from the perspective of establishing freedom from want, freedom from fear and freedom to live in dignity”, p. 15. Actually, the section of “Freedom to live in dignity” includes the issues of “Health security” and “Environmental security” (differing from the 2005 UN SG’s Report, *In larger freedom*, which related this pillar to aspects of democracy, human rights and rule of law). However, these two types of insecurities are approached from the point of view of the Palestinian occupation, given that “as in other cases of occupation, the freedom to live in dignity is palpably absent”, whereby the lack of autonomy and self-determination over health services, environmental resources and access to land, have played a major role in creating a condition of human insecurity in these specific areas; quote from p. 16. See pp. 91-93 with regard to environmental insecurity. In relation to health insecurity, the Report also highlights the state of psychological health and in addressing aspects of subjective human insecurity, the qualitative measures that expose rising feelings of fear, humiliation and depression, indicating that “81% of Palestinian youth are either extremely depressed or depressed”, and that the “realities of occupation and...conflict profoundly threaten long term physical, emotional and social well-being”, pp. 86-87.

promotion, protection and fulfilment of human rights. Human security also provides a framework from which to analyse a given legal system as a whole as to its generalized state of realisation of a rights-based rule of law, and it also offers elements to construct such rule of law where necessary or fill the relevant gaps.¹²⁶

Others have noted as well that rather than defending themselves from its invocation, State elites can appropriate the human security concept for their own interests by emphasizing the continuing, even enhanced, importance of states as the *organizers of co-operation* and the defenders of the interests of their citizens in a world where individuals have progressively less capacity as individuals or even as groups to defend themselves against the multiple threats of global dimension to their security. In this sense, human security becomes the indicator test of governmental legitimacy. In other words, *the State as icon is replaced by the State as human utility maximizer*,¹²⁷ a shift that may prove useful especially when considering human rights as minimum standards from which to build upwards. Of course, the risk of States viewing the concept with good eyes is their appropriation of the human security debate and the watering-down of its potential as an idea that can foster horizontality of human rights and be used by civil society to build transnational partnerships around shared aims. Let us recall that the human security language and objectives was used by human rights and social organizations to successfully promote the Mine Ban Treaty and the Rome Statute of the ICC, as referred above.

Some authors have turned more to the practical difficulties in implementing human security, more than in a conceptual flaw of the definition. Marlies Glasius has outlined a defence of the human security conception, first, in its value for shifting from a focus on state security to one on human rights, and, secondly, in having argued for the indivisibility of physical and material security. She signals that the problem lies more in the lack of operationalization of the concept and proposes a set of practical conditions that the “human security worker” would have to portray.¹²⁸

This thesis has argued in favour of a broad conception of human security which includes all human rights at its core. However, I agree with the concern that there are inherent difficulties in applying such a wide-ranging notion in practice and that criteria are needed to draw the limits and define the scope of action of any human security proposal. In that sense, it is submitted in the last section of the present chapter that we need a threshold-based definition with a strong human rights-based approach. Part of the arguments presented throughout the thesis are focused precisely on the ways in which human rights norms and standards can contribute to better delineating this threshold in each concrete situation.

It is also submitted that we may find in human security a strong political potential to provoke a renewal in the debate on security towards including a stronger human rights-based approach, and act as a counterbalance particularly after 9/11 and the risks to the enjoyment of human rights derived from the current struggle for security at the international level, as well as more localized challenges at the national or local levels through the exclusive or in some conditions abusive use

¹²⁶ In this sense, see Miakhel, Shahmahmood, “Human security and the rule of law: Afghanistan's experience”, in Mason, Whit (editor), *The rule of law in Afghanistan: missing in inaction*, Cambridge University Press, Cambridge, New York, 2011.

¹²⁷ Farer, Tom, *op. cit.*, p. 52.

¹²⁸ See Glasius, Marlies, “Human Security from Paradigm Shift to Operationalization: Job Description for a Human Security Worker”, in *Security Dialogue*, March 2008, vol. 39, no. 1, pp. 31-54. See also by the same author “Human Security: a Shifting and Bridging Concept that can be operationalized”, in *Human rights and conflicts: essays in honour of Bas de Gaay Fortman*, Intersentia, Cambridge, 2012, pp. 159-178.

of concepts of *State security* -challenged in the UNDP regional and national reports referred to-, or *public security* (as in the Latin American context mostly in past authoritarian regimes).¹²⁹

As Alice Edwards notes, recourse to rights-based language has been met with, in some cases, limited success or even resistance, thus “[i]t is at this juncture between rights and security that human security - as a transboundary and cross-disciplinary concept - can potentially step in to bolster, strengthen, and support the law. For States, it may permit the reconciliation of instrumentalist and non-instrumentalist goals”. However, the risks of a human security approach must not be forgotten. As Edwards also signals, “it may be applied to further political objectives rather than as a set of guiding principles and must be carefully monitored to ensure that States do not appropriate it entirely for their own ends”. I would agree with her in saying that “Before international lawyers can reject the notion of human security on the basis of its non-legal, and therefore nonbinding, character, it is necessary to examine the gaps in the existing legal framework, into which policy discourse, including security discourse, may step in as an important player”.¹³⁰

As we will see throughout this thesis, it is true that the non-legal or semi-legal character of ‘human security’ as such at the *universal* international level can be observed on the whole. The UN Secretary General’s *Second Report on Human Security* formally refers to it as a ‘policy framework’. Notwithstanding, this thesis shows it has been included in UNSC and general UN documents and influenced the content of various legal instruments and interpretations.

Now, when turning to the *regional* levels, it becomes clear that this non-binding condition is only relative, given that human security itself or several of its elements have actually been picked-up by positive law. This is a recent development and therefore human security as a full legal concept could only be considered to be situated in an *emerging status*. In any event, the case still stands that for international legal scholarship to dismiss it, the first step as Edwards highlights, is to review the existing state of international human rights law and its possible shortcomings. As will be analysed in this thesis, the notion of human security gains importance then not insofar as to its strength or weakness as a legal concept, which is not the main focus of this thesis, but of the relevance it can display for legal analysis and the practical applications for the protection of human rights of persons in a vulnerable situation.

In whichever of its conceptions, the fact is that in addition to the legal instruments that adopt it and the academic literature that discusses it, human security plays a key function in different national¹³¹ and international institutional arrangements,¹³² in NGO agendas,¹³³ in inter-

¹²⁹ See Inter-American Commission of Human Rights, Organization of American States, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, Doc. 57, 31 December 2009, paras. 2-4 of Executive Summary.

¹³⁰ Edwards, Alice, “Human security and the rights of refugees: transcending territorial and disciplinary borders”, *op. cit.*, pp. 767-768.

¹³¹ For example, based on the broad notion of human security, Thailand formed its Ministry of Social Development and Human Security which still functions till today; see <http://www.m-society.go.th/en/index.php>, as well as the references to this Ministry in the Concluding Observations on Thailand by the UN Committee on the Rights of the Child in reviewing the State’s compliance with the corresponding Convention, 3 February 2012, CRC/C/SR.1698, at <http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/bed3dd7764468b53c125685e004653e7/133eeb0015b8a3a2c1257a0600353cff?OpenDocument> Tellingly, the U.S. recently modified the structure of its State Department and changed its Office of the Under Secretary for Democracy and Global Affairs to become Under Secretary for Civilian Security, Democracy, and Human Rights, focused on prioritizing “the security of individuals” and “building just societies”; see Otero, Maria, Press Conference “State Department Briefing on Establishment of the Office of the Under Secretary for Civilian Security, Democracy, and Human Rights”, in *Council on Foreign Relations*, January 6, 2012, available at

governmental organizations and regional bodies.¹³⁴ The latest report of 2012 by the UNSG indicates that through the support of the United Nations Trust Fund for Human Security to over 200 projects in 70 countries, including regional projects, the Fund has played an important role in translating the human security approach into practical actions that have helped to strengthen the human security of the most vulnerable communities and people around the world.¹³⁵ All of these projects and initiatives by different actors hold a connection –more or less direct- to the respect and implementation of human rights. Therefore, the utility of exploring more closely its links with Public International Law in general and International Human Rights Law in particular, comes to the fore.

One has to be aware, though, of the risk of human security diluting already established and binding legal obligations concerning human rights. Certainly, this possibility exists if human rights are only left at the level of discourse as a passing-by concern in referring to the content of human security, and not specified further in their full normative implications. It is at this juncture that legal scholarship should not be absent, in order to counterbalance this risk, at the least, to not allow the human security debate to become co-opted by a dominant position which could ‘securitize’ issues to the detriment of the weakest and further harm their rights, and at best, to contribute to clarifying the link between human security and human rights and the potentials of this relationship for more effective protection of the most vulnerable, at the core of the human security concern. It could be signalled, with Astrid Suhrke, that human security must be addressed by International Law, if only to prevent its misappropriation by actors and debates that could bend it in detriment of the human rights of those most vulnerable.¹³⁶

Moreover, the present time offers an interesting window of opportunity for the reflections on human security and human rights, given that the Second Report on Human Security by the UN SG to the General Assembly was issued in April 2012 and recently agreed upon by this last body in

<http://www.cfr.org/diplomacy/state-department-briefing-establishment-office-under-secretary-civilian-security-democracy-human-rights/p26980>

¹³² To give an example, the UN Trust Fund in Human Security is one of the largest trust funds of its kind established in the United Nations. According to its own data, since its foundation in 1999 to 2008, the trust fund dedicated USD 340 million to projects in over 70 countries in the world, see <http://ochaonline.un.org/Home/tabid/2097/Default.aspx>. In comparison, for 2008, the annual budget of the whole UN Office of the High Commissioner for Human Rights (UN OHCHR) was roughly USD 177 million (including the corresponding percentage of the UN regular budget and voluntary contributions), see <http://www.ohchr.org/EN/AboutUs/Pages/FundingBudget.aspx>. The regular funding of the UN OHCHR for the 2008-2009 biennium was USD 115.3 million, and the voluntary contributions in 2008 were USD 119.9 million. For the biennium of 2010-2011, the OHCHR was allocated USD 151.6 million of the regular UN budget and in 2011 received roughly USD 111 million of voluntary contributions; see UN OHCHR Report 2011, pp. 124-125, available at http://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011_web/allegati/16_Funding.pdf.

¹³³ See Michael, Sarah, “The Role of NGOs in Human Security”, Working Paper No.12, The Hauser Center for Nonprofit Organizations and The Kennedy School of Government, Harvard University, November 2002, for an analysis of NGOs as indispensable actors in certain States and contexts, notably Kenya and India, for the decrease of threats under the human security notion and the mobilization of aid and donor institutions in this direction.

¹³⁴ Expressions of human security may be found in the Organization of American States (OAS); the European Union (EU); the Association of Southeast Asian Nations (ASEAN); the African Union (AU); and the League of Arab States (LAS); see Report of the UN Secretary General on Human Security, A/Res/64/701, 8 March 2010, para. 3, as well as Träschler, Daniel, “Human Security: Genesis, Debates, Trends”, *CSS Analysis in Security Studies*, No. 90, March 2011, Center for Security Studies, ETH Zurich.

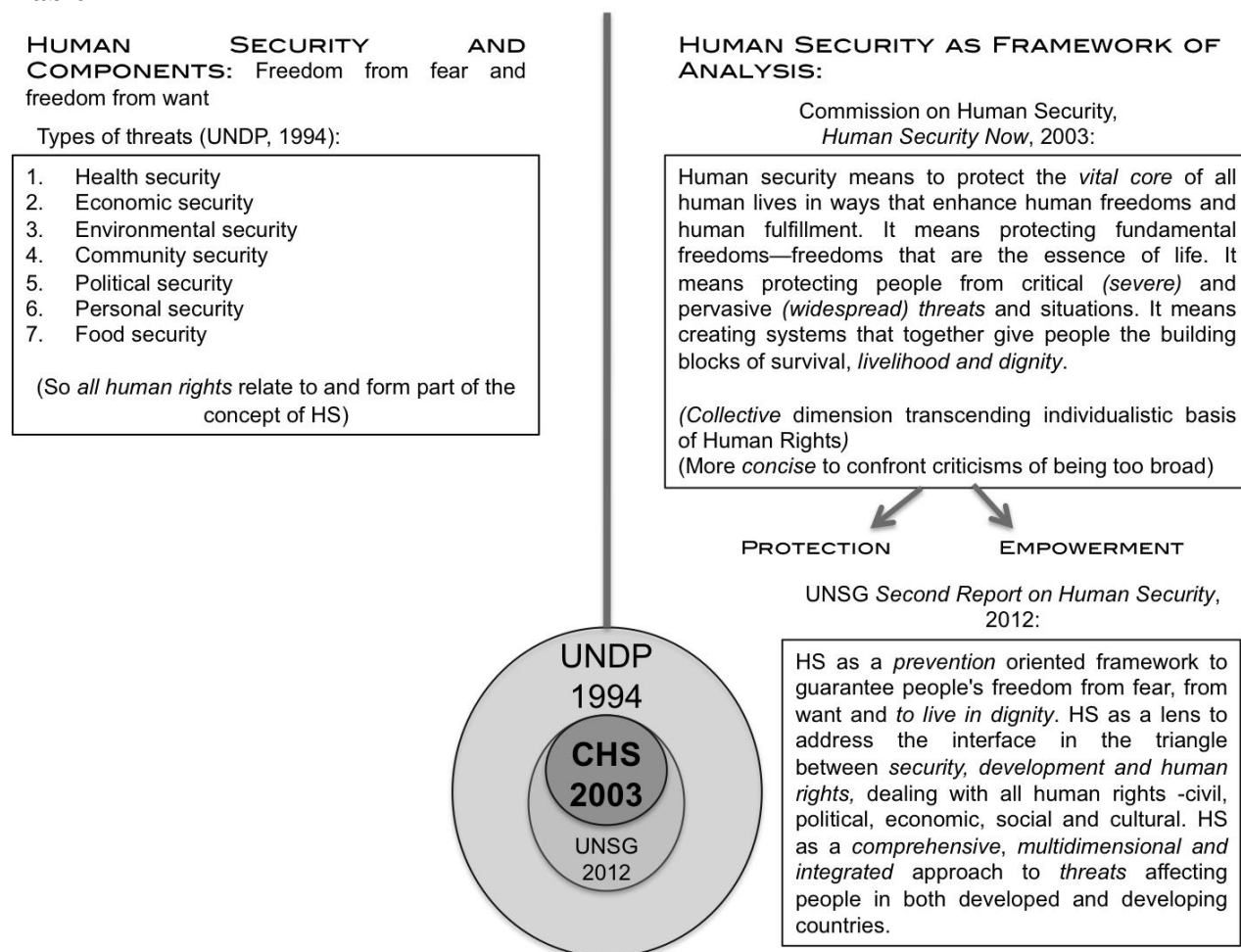
¹³⁵ United Nations General Assembly A/66/763, 5 April 2012, *op. cit.*, para. 56.

¹³⁶ See Suhrke, Astrid, “Human Security and the Protection of Refugees”, in Newman, Edward and Joanne van Selms (editors), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State*, 2003, pp. 93-115.

October 2012. The report is unambiguous in indicating the consensus of Member States that human security never involves the threat of or use of armed force, which in turn minimizes the risk of militarizing issues under a human security face. The report concludes by providing a set of recommendations as a follow-up to the proposed actions to implement human security and the commitment contained in the World Summit Outcome of 2005. With the recent endorsement of the UNGA of the notion proposed by the UNSG in his 2012 report, the full implications of this ‘common understanding’ of human security, which favours a broad conception specifically including *all* human rights -civil, political, economic, social and cultural- are yet to be seen.

Having had the opportunity to presence this informal UN debate on human security in 2011, strengthened my conviction in the need and benefit for legal scholarship to engage actively in this discussion based on a more precise definition of human security under the 2003 Report of the CHS, complemented by the 2012 UN SG’s Second Report on Human Security. It is submitted that this definition can constitute the parameter for the legal analysis of **Part 2** of this thesis, while at the same time confronting the criticisms towards human security of being too broad to be operational, as illustrated in the following summarized view in **Table 2**:

Table 2



As explained above, what we find represented graphically in **Table 2**, is that the 1994 UNDP definition of human security inspired by the original UN ideal of freedom from fear and from want and its seven sub-types, is taken as a departing point to build the 2003 CHS concept, as well as that reflected in the UNSG's Report of 2012, endorsed by the UNGA.

However, these last two conceptions are more accurately defined, surpassing the seven human security categories outlined in 1994 and deepening and specifying the scope of attention of the human security concerns at the start of the twenty-first century. The 2003 report proposes a concrete definition of human security and the nature of the threats it is concerned with, underlining their gravity and their collective dimension. The report by the UNSG in turn considers as valid the 2003 definition and reaffirms its preventive character, but further articulates the element of 'freedom to live in dignity' and presents a more concrete linkage to human rights, emphasizing they are *all* relevant to realise the triangle of security, development and human rights that human security encompasses. It is this second conceptualization of human security as a lens, a framework of analysis -resulting from the combination of the 2003 CHS definition and the 2012 'common understanding' contained in the 2012 UNSG report- that will constitute the foundation of the examination of this thesis.

I.4 Measuring human security levels

It must be noted that in spite of the fact that the UN documents have adopted a broad understanding of human security, the positions of States, the academic debate, as well as the measurement exercises of human security, have been fragmented into various positions.

In an overlook to summarize such positions one may find the following conceptions, which aim at highlighting the links of existing measuring exercises insofar as relevant for the human rights' analysis presented in this text, and to conclude with offering a proposal to move forward on the basis of the arguments of this thesis:

1. Human security as the protection from physical violent conflict and bodily injury. This type of exercises analyse violent conflict, whether or not it stems from armed conflict between States, that is, also conflict deriving from political or criminal violence (usually referred to as the 'narrow definition' related more to 'freedom from fear'), which one could consider mainly to affect the right to life, liberty and personal security, and physical integrity. Under this category, we may locate the following proposals:

- A. The *Human Security Report Project*, coordinated by Andrew Mack and issued first by the University of British Columbia, and later by the Simon Fraser University, Canada.¹³⁷ While recognizing that "hunger, disease and natural disasters kill far more people than war, genocide and terrorism combined",¹³⁸ this Report has been measuring since 2005 the world's conditions of human security relating it to *violent conflict* and emphasizing (previously neglected) intra-State conflict.

The most recent *Human Security Report 2012*, dedicated partly to the study of intra-war sexual violence, emphasizes how in this context domestic violence against women –which actually is higher than war-related sexual violence-, is frequently overshadowed and dismissed, consistent with some of the underestimated challenges signalled in Chapter III of this thesis.¹³⁹

- B. In this same category of diagnosis efforts, although not under the label of human security, we may find other people-centered approaches such as the index developed in the report *Peoples under Threat (PUT)*, issued by Minority Rights Group International (MRGI). Based on previous research findings by other institutions, including UN bodies, MRGI has constructed a worldwide table, specifically designed to identify the *risk* of genocide, mass killing or other systematic violent repression, unlike most other early warning tools, which focus on *violent conflict as such*. Its primary application is civilian protection.¹⁴⁰ With a stronger human rights based approach than the previous

¹³⁷ The Human Security Report Project, coordinated by Andrew Mack, was transferred in May 2007 from the Human Security Centre at the Liu Institute for Global Issues, University of British Columbia, to the School for International Studies of Simon Fraser University in Canada. This School has continued the task of issuing the annual report.

¹³⁸ Human Security Report Project, *Human Security Report 2005. War and Peace in the 21st Century*, Human Security Centre, University of British Columbia, Canada, Oxford University Press, 2005, p. VIII.

¹³⁹ Human Security Report Project, *Human Security Report 2012: Sexual Violence, Education, and War: Beyond the Mainstream Narrative*, Human Security Press, Vancouver, 2012.

¹⁴⁰ *Peoples Under Threat, Online Briefing* (by Mark Lattimer), Minority Rights Group International, 2012, p. 7, available at <http://www.minorityrights.org/11337/peoples-under-threat/peoples-under-threat-2012.html>

Human Security Reporting Project, the most recent report of PUT 2012 indicates a great increase in the likelihood of atrocity, in the face of certain characteristics at the State level, including habituation to *illegal violence* among the armed forces or police and prevailing *impunity for human rights violations*. In an approach similar to the analysis of structural vulnerability presented in this thesis, the PUT report also recognizes that “some groups may experience higher levels of discrimination and be at greater risk than others in any given state”, and the report duly identifies the groups in each State which the authors conclude to be under most threat: usually ethnic or religious minorities.¹⁴¹

2. Human security as the defence from risks related to development aspects and socio-economic conditions. This category of measuring exercises adopts the ‘broad definition’ of human security related more to ‘freedom from want’, an approach that remains closer to ESC Rights. These efforts have in general been less elaborated, possibly in part because of parallel existing exercises carried out by the UNDP or the Millennium Development Goals, but mostly due to the eclectic types of diagnosis that build on the present proposals and duly relate development concerns with levels of risk and human rights enjoyment, as will be seen below. However there are some identifiable approaches worth mentioning:

A. The proposal of Gary King and Christopher Murray who try to focus the human security definition on one's "expectation of years of life without experiencing the state of *generalized poverty*". In their definition, ‘generalized poverty’ means "falling below *critical* thresholds in any domain of well-being"; for which they also provide a review and categories of "Domains of Well-being".¹⁴²

B. Following this line, John F. Jones has advocated for the Millennium Development Goals (MDG)¹⁴³ as the adequate indicators to measure human security, as broad structural aims with quantitative and qualitative parameters in the socio-economic field, agreed upon by the international community within the formality of the UN institutional setting.¹⁴⁴ Carla Ferstman and Alice Edwards have also voiced their support for adopting a broad definition of human security to “combine both traditional security issues and their impact/intersection with non-citizens (e.g. terrorism and armed conflict), with issues that have not been traditionally seen within a security framework (e.g. development, poverty and the environment)”.¹⁴⁵

- 3) Eclectic positions: these proposals attempt to further explore the triangle of security, development and human rights as advanced by recent ideas on human security, all sharing a risk-based focus and concentrating on a people-centred approach:

A. Some authors have attempted to determine if human security primarily is a phenomenon of

¹⁴¹ *Ibidem*.

¹⁴² King, Gary and Christopher J.L. Murray, “Rethinking Human Security”, in *Political Science Quarterly*, 2004, pp. 586-610. Emphasis added.

¹⁴³ Millennium Development Goals, adopted by the UN General Assembly in 2000, available at <http://www.un.org/millenniumgoals/gender.shtml>

¹⁴⁴ See *RDD. Regional Development Dialogue: Assessing Human Security*, Vol. 31, No. 1, Spring 2010, United Nations Center for Regional Development, Nagoya, Japan.

¹⁴⁵ Edwards, Alice and Carla Ferstman (editors), *Human Security and Non-Citizens: Law, Policy and International Affairs*, Cambridge University Press, Cambridge, 2010, p. 24.

economic development, institutional quality, geography, or some combination. Of these factors, they explore ‘deep determinants’: factors that are strongly correlated with increases or sustained levels of human security. An original proposal, with a very helpful historical perspective, has been presented in applying such model to a sample of former colonies. This focus allows for concentration on those populations facing the greatest human security risks. According to the authors, while economists have investigated some elements of the general human security puzzle, thus far their research has produced statistically robust yet theoretically thin findings. This model attempts to correct for these theoretical shortcomings through the inclusion of strictly focused political and social variables.¹⁴⁶

Thus, the authors propose human security as the dependent variable (DV) in their study, which is composed of the five main domains identified by King and Murray: (1) income; (2) health; (3) education; (4) political freedom; and (5) democracy, applied to 72 former colonies, both developed and developing countries today. The study uses such domains as a departure point but places more emphasis on the *influence of institutions* as a deep determinant for human security, or its degradation.

This analysis notes that while human security seems to be a more pressing concern in developing states, other points stick out in the results, leading to substantive conclusions. First, the level of democracy is not necessarily a good indicator of human security. While on the surface it is easy to claim that humans are more secure in democracies, this is not necessarily the case. In fact, the data indicate that given the type of exports and latitude, people may be safer in a more autocratic State, especially if the country has low levels of ethnic diversity. The authors find the controlling factor ‘ethnic linguistic differences’ to be substantively important. Second, economic factors seem to be reliable in explaining levels of human security. However, it is not all forms of economic behaviour that have correlations with human security. Openness to foreign trade and exchange rate do matter. The results for institutional factor are the most robust and significant, and they indicate that strong institutions can act as a guarantor of human security, even in developing countries.

This last finding would seem to point to the relevance of exploring the capabilities of human rights norms and standards as a an essential tool for designing and implementing public policies and building cooperative institutional networks, as the items identified in this thesis for future research suggest.

- B.** One of the most recent measurement proposals of human security, released in December 2010, has been developed building on existing quantitative and qualitative data and resources from several international organizations, academic institutions and NGOs, to generate a ‘Human Security Index’ (HSI). The HSI took the existing Human Development Index of the UNDP (HDI) as its main starting point, and expanded the geographic coverage to 232 countries and dependencies (compared to 169 measured in the 2010 UNDP report) improving what its central proponent, David A. Hastings, perceived as gaps in the HDI.¹⁴⁷

¹⁴⁶ St. Marie, Joseph J., Samuel S. Stanton, Jr. and Shahdad Naghshpour, “The Colonial Origins of Human Security: Economic, Geographic, and Institutional Determinants”, in *Politics & Policy*, Volume 36, No. 1, 2008, pp. 80-106.

¹⁴⁷ Human Security Index in its first version was proposed in 2008, building on the HDI, but modified in this exercise by indicators of equitability and inclusiveness. See Hastings, David A., “The Human Security Index: An Update and a New Release”, HumanSecurityIndex.org, 2012, available at http://www.humansecurityindex.org/wordpress/wp-content/uploads/2012/02/hsiv2-documentation-report1_1.pdf. See also by the same author “From Human

The HSI is built around a “trinity of Economic, Environmental, and Social Fabric Indices”, and integrates interesting data and existing composite indicators such as the Environmental Vulnerability Index and the Gender Gap Index. The HSI would appear at first stance as a review closer to ESC Rights. However, when looking at the determining components of the indexes, one finds income inequality, food security, health, *peacefulness and governance*, these two not far from classic concerns of civil and political rights. The element of peacefulness considers, for example, incarceration rates measured through the *World Prison Population List* and the *World Pre-Trial/Remand Imprisonment List*,¹⁴⁸ themes related primarily to the rights to liberty and security of the person, as well as the rights of access to justice and fair trial.

Interestingly enough, and in line with the concerns expressed in Chapter III of this thesis, the HSI creators, based on a proposal by Janet Billson, consider that “*domestic violence* would be an invaluable, though very challenging, phenomenon to characterize through some form of indicator. HumanSecurityIndex.org would be tempted to place such an indicator in this grouping on *peacefulness*”,¹⁴⁹ if such a measurement existed. It is to be celebrated that the HSI reflects on the need of adopting a broader understanding of the peace/violence dichotomy, and the hope is expressed for a proper methodology to be developed in the future in order to duly incorporate such view to the Index. It is submitted that such a proposal would be enriched with looking also at human rights indicators and standards in this field, including the quasi-judicial and judicial criteria developed on the basis of the normative framework on Violence Against Women (which of course includes ‘domestic violence’), and the proper definition of this type of violence, as suggested in Chapter III below.

- C. In a line that places more emphasis on subjective elements of security, but also following an eclectic position that moves beyond measurement solely of physical violence and considers socioeconomic-related risks, we may find the very recent proposal by Ronald F. Inglehart and Pippa Norris. Their work firstly presents an analytical model of human security, and secondly, argues that it is important to measure how ordinary people perceive risks, moving beyond state-centric notions of human security. Also utilizing the work of King and Murray as a platform based on levels of severity of objective factors of well-being (referred in point 2 above), the authors move forward to examine new evidence that draws upon survey items specially designed to monitor perceptions of human security, included for the first time in the sixth wave of the World Values Survey (WVS), with fieldwork conducted in 2010-12. The results, taken through examining a group of seven countries with different levels of human development and democratization (United States, Sweden, Japan, the Republic of Korea, Spain, Trinidad and Tobago, and Morocco), demonstrate that people distinguish three dimensions –national, community and personal security– and consequently the authors explore some structural determinants driving these

Development to Human Security: A Prototype Human Security Index", United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), Working Paper WP/09/03, 2009, available at <http://www.unescap.org/publications/detail.asp?id=1345>; "Filling Gaps in the Human Development Index". UNESCAP, Working Paper WP/09/02, 2009, available at <http://www.unescap.org/publications/detail.asp?id=1308>; and "Describing the Human Condition – from Human Development to Human Security", GIS-IDEAS 2008 Conference "Towards a Sustainable and Creative Humanosphere", 2008, available at <http://wgrass.media.osaka-cu.ac.jp/gisideas08/viewabstract.php?id=299>.

¹⁴⁸ See <http://www.humansecurityindex.org/?p=92>

¹⁴⁹ *Ibidem*.

perceptions.¹⁵⁰

Within the questions presented by Inglehart and Norris to build their survey and indicators, specifically under the axis of national security, several are related to the main thematic cores of this thesis, signalling illustrative perceptions related to gender inequality and social attitudes towards migrants: “When jobs are scarce, do men have more right to a job than women? Is a university education more important for a boy than for a girl? When jobs are scarce, should employers give preference to people of (your nationality) over foreigners? Would you be willing to have a foreign worker/immigrant as a neighbour?”

At the same time, the model also evidences perceptions of (in)security of immigrants themselves (among other sectors of national population), within the indexes of both community and personal security, under questions such as: “In the last 12 months, how often has your family- Gone without enough food to eat? Felt unsafe from crime in your home? Gone without medicine or medical treatment that you needed? Gone without a cash income? Regarding personal security, the model reflects the results from questions as “How frequently do the following things occur in your neighbourhood? – Robberies; Alcohol consumption in the streets; Police or military interfere with people’s private life; Racist behaviour; Drug sale in streets”.¹⁵¹

On the basis of the results, the authors discuss why perceptions of human security matter, particularly for explaining cultural values and value change around the world. The conclusion argues that the shift from a narrow focus on military security toward the broader concept of human security is a natural response to the changing challenges facing developed societies, in which the cost-benefit ratio concerning war has become negative and cultural changes have made war less acceptable. In this setting, valid measures of perceptions of human security have become essential, both to understand the determinants of the concept among ordinary people and to analyse their consequences.

I.4.1 A human security measurement with a gendered human rights-based approach at its core

The fourth position of this thesis as built upon the proposals reviewed above and moving a step further, is to conceive a human security diagnosis based on a human rights-based approach (HRBA). A broad idea of human security seems to hold more promise in making visible the threats to persons or groups that would otherwise possibly remain unseen in two fronts: a) all the other categories of widespread threats that do not necessarily involve the most grave cases of harm: genocide, crimes against humanity, war crimes, mass killing or other systematic violent repression; but that represent nonetheless severe risks to persons or collectivities, for example, extreme poverty or systemic forms of violence that are frequently shadowed to the public eye, such as certain forms of violence against women, for example, domestic violence; b) the threats affecting certain parts of the population, such as women and girls, or certain sectors of society, such as undocumented migrants -both analysed in this text - that because of their non-membership or contingent relationship to ethnic, linguistic or religious minorities, become trapped in the

¹⁵⁰ Inglehart, Ronald F. and Pippa Norris, “The Four Horsemen of the Apocalypse: Understanding Human Security”, The 2011 Johan Skytte Prize Lecture, in *Scandinavian Political Studies*, Volume 35, Issue 1, 2012, pp. 71-96.

¹⁵¹ *Ibid.*, Appendix, p. 94 and analysis on p. 84.

middle of other existing categories, and the particular risks confronted by them are underrepresented or rendered invisible. In these cases, gender and legal status related to entry or residence in a given State -possibly added to class, race, national origin, ethnicity or skin colour- become the two driving factors for discrimination and other human rights violations, a risk which human security may highlight in a more efficient and decided manner.

As Taylor Owen puts it, “the broad versus narrow conceptualization, while theoretically useful, is practically counter-productive. It implies that the narrower the definition, the easier the threat assessment and indicator selection and the more precise the final account will be. This need not be the case. Human security threats should be included not because they fall into a particular category, such as violence, but because of their actual severity. In this conception, what human security means is not defined by an arbitrary list, but by what threats are actually affecting people”, a reason for which he advocates in favour of a ‘hybrid definition’ that takes into account levels of severity of each particular threat.¹⁵² Consequently, this thesis agrees with the position of a threshold-based definition, as explained below, but proposes to incorporate gender and human rights standards into such evaluation of severity and at the same time to use such standards in order to translate the human security assessment into specific human rights obligations.

Some recent examples of analysis directed to these themes are the following:

- A. The *World Disaster Report of 2012. Focus on forced migration and displacement*, of the International Federation of the Red Cross and Red Crescent Societies, actually dedicates a section to one of the thematic cores of this thesis, namely, irregular migration and its consequences on the enjoyment of human rights. It is not a coincidence that migration is studied in this last year as one of the central global phenomena that entails risks for the realisation of human rights, risks that may even amount to a ‘disaster’ in humanitarian terms. The Report also endorses the recent World Bank’s *Guidelines for Assessing the Impacts and Costs of Forced Displacement* of the World Bank¹⁵³ which present a certain measuring exercise in the form of Guidelines that employ a mixed methodology of quantitative and qualitative tools. It utilizes quantifiable indicators that can be ‘costed’, such as income and assets of forcefully displaced people; but not all the impacts can be expressed in monetary terms. In the qualitative part, the Report specifically refers to the examination of human security, as well as a gender-sensitive outlook as proposed by this thesis, by specifying that “qualitative indicators are used to determine the impacts of variables such as the *reduction (or increase) in human security*, the adoption of coping mechanisms and *changing gender roles*”. According to the IFRC’s Report, this mixed methodology approach facilitates a holistic analysis of the different dimensions of impacts and costs of forcefully displaced people, and their policy and programme implications.¹⁵⁴
- B. The *Universal Human Rights Index (UHRI)* is designed primarily to facilitate access to human rights recommendations issued by three key pillars of the UN human rights protection system: the Treaty Bodies established under international human rights treaties as well as the Special Procedures, and the Universal Periodic Review (UPR) of the Human Rights Council. The UHRI offers instant access to objective and comprehensive

¹⁵² Owen, Taylor, “Challenges and opportunities for defining and measuring human security”, *op. cit.*, p. 20.

¹⁵³ World Bank, *Guidelines for Assessing the Impacts and Costs of Forced Displacement*, World Bank, Washington D.C., 2012, available at www.worldbank.org/forced-displacement.

¹⁵⁴ IFRC, *World Disasters Report 2012. Focus on forced migration and displacement*, *op. cit.*, p. 203.

information on human rights situations around the world. The information compiled in the Index enables users to gain an international perspective on national and regional human rights developments; align the conclusions and/or recommendations of treaty bodies, the special procedures and the Universal Periodic Review of the UN Human Rights Council; and give an overview on cooperation between States and international bodies and mechanisms. According to the UN Office of the High Commissioner for Human Rights (OHCHR), the Index aims at assisting States in the implementation of recommendations and at facilitating follow-up. It also greatly simplifies the work of the United Nations, National Human Rights Institutions (NHRIs), non-governmental institutions and other civil society actors and researchers using these UN recommendations in their work.¹⁵⁵

- C. The *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights* was prepared also by the UN OHCHR in response to a request from the inter-committee meeting of treaty bodies (ICM) in June 2006 asking the Secretariat to undertake validation of the approach on the use of statistical information in States parties' reports, develop further list of indicators and submit a report on this work to the seventh ICM in 2008.¹⁵⁶ This report outlines the adopted conceptual and methodological framework for identifying the relevant quantitative indicators as it evolved between 2006 and 2008. It discusses the relevance of using the configuration of "structural-process-outcome" indicators for the said framework and highlights some considerations in the selection of the illustrative indicators on different human rights. It outlines the results from regional and country-level consultations and feedback from the validation exercises undertaken for this work. It also reflects on some issues relevant for taking this work forward at country level.
- D. The UN OHCHR's *Human Rights Indicators: A Guide to Measurement and Implementation* were issued in November 2012 as a set of markers for human rights' monitoring and diagnosis, resulting from the previous exercises. The indicators do not count for measuring a State's full compliance with human rights standards, but they do however, as the name signals, constitute a symbolic message in the sense of evaluating a State's performance in human rights issues. The Guide also mentions some successful experiences of application of such indicators as the basis for State reporting in compliance with human rights treaties, in the cases of Guatemala, Mexico, Kenya, Sweden and the United Kingdom. Guatemala is the first country to have used the indicators in 2009 to carry out its reports presented to monitoring mechanisms.¹⁵⁷ Such indicators open the door for further exploration as very useful tools for a human security diagnosis with a strong HRBA in order to identify and assess levels of risk and vulnerability affecting human rights.

From the whole examination presented above of the different conceptions and measuring exercises, it would seem that the human security debate had initially reproduced to a certain extent the Cold War division related to human rights (civil and political/ESC Rights), from the point of view of hierarchical importance of rights and the risks related to their enjoyment. This seemed to

¹⁵⁵ See <http://uhri.ohchr.org/about>

¹⁵⁶ UN International Human Rights Instruments, HRI/MC/2008/3, 6 June 2008.

¹⁵⁷ UN OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation*, HR/PUB/12/5, UN, New York and Geneva, 2012; see also "Ground breaking work from the UN Human Rights Office – UN High Commissioner for Human Rights Navi Pillay introduces a guide to human rights indicators", and "Indicators: essential tools for human rights", 7 November 2012, available at <http://www.ohchr.org/EN/NewsEvents/Pages/IndicatorsestentialtoolsinrealisationofHR.aspx>

be related as well to the perceived usefulness and viability -political or practical- of considering the fulfilment of certain rights or the protection of a set of risks as a matter of human security. However, in the last few years, considering the creation of the HSI, the recent discussion within the UN, regional organizations, academic debate and civil society initiatives, there is evidence to suggest that, both at the conceptual and the operational level, there is relative agreement in adopting a broad understanding of human security that places at its core the protection of *all* human rights (even if for practical reasons, some measurement exercises have chosen to focus only on some aspects of the notion).

Such a position reinforces the international human rights law axiom of considering all human rights -civil, political, economic, social and cultural-, as universal, indivisible and interdependent. It must be flagged, however, that none of the measuring models of human security specifically adopt existing human rights indicators, and very few of the conceptual analysis explain exactly *how* human security relates to human rights, especially in the legal sense, and the potentials and implications of this relationship.

As it has been signalled, the criticisms, eulogies, and dominant trends of discussion described above have found their way inside the walls of the UN. A broad understanding of human security was, in fact, the view confirmed by the 2012 UN SG's Report and consequently agreed upon by the UNGA.

It is submitted that any human security analysis would have to consider as one of the building-blocks -apart from the data on violent conflict, development and threats assessments indicated above-, the human rights indicators advanced by international human rights bodies (also regional and local if called for), such as the *Universal Human Rights Index*, the *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights* and the *Human Rights Indicators: A Guide to Measurement and Implementation*, all developed by the UN Office of the High Commissioner for Human Rights. At the same time, it would have to include in its assessments of levels of risk, deprivation or violent conflict, indicators of human (in)security as related to violence against women, as well as broader diagnoses of discrimination against women under the normative human rights standards that will be explored in Chapter III below. At this point, let us only be reminded that conceptions of threat, conflict and violence, direct or indirect, related to armed force or not, should portray the threats posed to women and the experiences of violence as suffered by them in order to result in authentically representative and useful measurements of human security.

To relate human rights indicators to human security assessments as proposed in this text, let us consider for example the last section of the above mentioned UN OHCHR *Report on Indicators*. This part of the report presents a very useful set of tables that encapsulate in a graphic manner the theoretical and practical basis developed throughout the document, a feature which could prove very useful for the intended aim of facilitating State reporting to human rights monitoring bodies and the consequent work of analysis by such bodies. For instance, related to the topic of this thesis and the types of security considered within international human rights law and reviewed in section II.2.1 below, the charts of the UN OHCHR *Report on Indicators* present relevant parameters to summarize and assess the level of compliance in relation to the human rights of personal security, social security, food security (within the right to food) and security of tenure (within the right to

adequate housing)¹⁵⁸ and would, of course, have to be further explored in light of the updated recent publication of the *UN OHCHR Guide to Human Rights Indicators*, of November 2012.

Apart from the described universal index and the project for generally valid human rights indicators at the UN level, there are several developments in human rights law at the regional level also in the realm of creation of indicators, for example, in the field of economic, social and cultural rights in the Inter-American context, as will be referred in Chapter II below. These and other qualitative and rights-based criteria that can serve as guidelines, such as the jurisprudence created by international and regional human rights quasi-judicial and judicial bodies, would be used to examine in a human security evaluation the actual levels of (un)fulfilment of rights according to severity and pervasiveness. This assessment, in turn, would be one of the elements considered to identify and determine levels of risk to human rights and thus, the status of human (in)security in a given context.

In any case, these proposals as to how human security could integrate a human rights based approach in a manner relevant to international policy frameworks, and the implications of *global governance* for the law more generally, are not the main concern of this thesis and are still an issue open for further development.¹⁵⁹ Suffice it to say in this respect that a broader policy-prescriptive task is to be found in human security advocacy in the field of human rights, possibly influential at the global but also at the regional and national levels.¹⁶⁰ This function may be developed when dealing with structural vulnerabilities, precisely because of their collective, widespread and multidimensional character. Similar proposals for human rights institutions to work together with states in favour of human rights oriented public policies are already on the table in the Inter-American system, as will be studied below.¹⁶¹ In particular, this thesis proposes that the risks affecting the human rights of women and girls facing violence and those of undocumented migrants, examined in Chapters III and IV respectively, could be benefitted from a human security analysis as a vehicle for highlighting the importance of certain concrete actions and developing them further:

1. Fact-finding and evidence-based work as part of preventive strategies.
2. Coordination between different existing studies of quantitative nature, giving elements for the qualitative analysis of threats that emerges from the mapping of diverse reports and

¹⁵⁸ *Ibid.*, Annex I. List of Illustrative Indicators, pp. 21-33.

¹⁵⁹ For work being carried out in this area, see Davis, Kevin E., Benedict Kingsbury and Sally Engle Merry, "Indicators as a Technology of Global Governance", IILJ Working Paper 2010/2 Rev, Finalized 08/02/2011, International Law and Justice Working Papers, Institute for International Law and Justice, New York University School of Law.

¹⁶⁰ Academic work on human rights and public policy is starting to develop, as already referred to. Some examples of how this relationship unfolds in practice are also to be found. In addition to the cases of National Human Rights Programs of Mexico and Guatemala mentioned in section I.5.3 on the 'working understanding' of human security below, at a broader geographic level, in Latin America, we find another example in a concrete human security-human rights concern parallel to that of Chapter III of this thesis, in addressing violence against women. The Regional Program in Latin America of UNIFEM (today incorporated into UN Women), "Ciudades Seguras: Violencia hacia las Mujeres y Políticas Públicas" ("Safe Cities: Violence Against Women and Public Policies"), that serves the purpose of strengthening the active citizenship of women in the exercise of their rights, with the goal of reducing the public and private violence that is displayed against them in cities and urban centers. This is also an example of successful institutional partnership between a UN body, civil society and national governments, available at http://www.americalatinagenera.org/es/index.php?option=com_content&view=article&id=295&Itemid=170

¹⁶¹ See Dulitzky, Ariel, "The Inter-American Human Rights System Fifty Years Later: Time for Changes", in *Quebec Journal of International Law* (Special Edition), 2011, pp. 142-143 and 163-164.

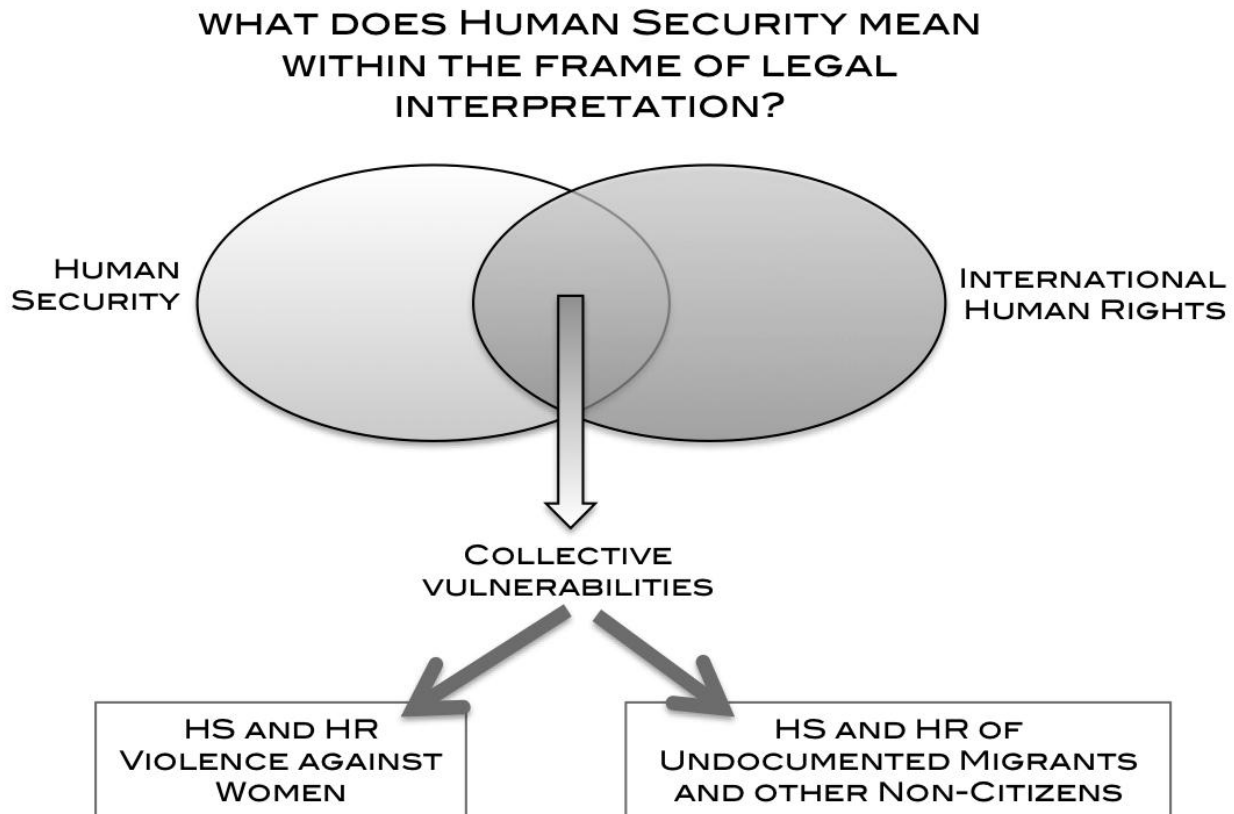
sources.

3. As a result, provoke a coordinated institutional response and dialogue between bodies that would normally not engage with each other.
4. When called for, once the ‘alarm’ has been triggered, activating the State’s positive obligations, to take adequate operational preventive or corrective measures.
5. These measures should reinforce human rights and establish a viable institutional system for granting reparations when required, but also enhance human capabilities, to use Martha Nussbaum’s language, in order to increase the individual’s life options –in this case, the woman or migrant’s vital realm of choice- to be able to surpass her condition of structural vulnerability and fully experience *freedom from fear, from want and to live in dignity*.
6. As additional advantages of human security that may be further explored, we find its capacity of promoting successful institutional partnerships as well as joint collaborations with civil society, also in the field of public policies with a human rights-based approach.
7. Push for legal interpretations recognizing the collective and interconnected dimensions of human rights, including in the issue of reparations.
8. Advancing a ‘rule of rights’ instead of only a ‘rule of law’.

Turning to the direct scope of this thesis, at this point it is argued that it is relevant to incorporate precise legal human rights components to certain identified elements of the human security notion, such as its conception of violence, for example. And inversely, to determine the potentials and limitations of applying a human security lens to human rights legal interpretation when confronted with situations affecting persons in conditions of structural vulnerability.

Under this light, what appears to hold promise in the human security approach, if it is to be relevant and add value to existing conceptions and methodologies, is its capability to highlight the *interrelatedness* between conditions that would otherwise be analysed in an isolated, and therefore incomplete, manner. Thus, this thesis explores such potential in terms of the legal evaluation of human rights’ issues and the influence and benefits this may signify for people in their everyday lives, in particular those in conditions of vulnerability, such as women and girls in risk situations, dealt with in Chapter III, as well as undocumented migrants and other non-citizens, approached in Chapter IV of this thesis, as illustrated in **Table 3** below:

Table 3



As analysed above and represented graphically in **Table 3**, the concerns of human security and international human rights law share a human-centered perspective and overlap in their concern with collective or structural vulnerabilities, that is, those created by severe and widespread threats. While human security provides for the identification of such pervasive risks situations, human rights law gives us the normative tools to address them. Both may complement each other insofar as human security alone lacks a strong normative legal grounding and human rights law on its own is generally constructed in terms of individual rights, making it difficult to legally tackle structural risks to rights.

The human security/human rights symbiosis, though, opens the door for creative integrated interpretations of human rights that look at such socially extended risks in an interrelated, less fragmented, manner and offer legal avenues to reinforce obligations that cover the whole spectrum of actions of prevention, protection and reparations related to human rights violations. At the same time, such an interaction of human security with human rights directs us to the construction of a facilitating environment for the fulfilment of the human rights of all, particularly of those placed in conditions of vulnerability. As illustrated in **Table 3** above, some of the most widespread structural vulnerabilities worldwide are reflected in the situations faced by women and girls at risk of or suffering violence, as well as those affecting undocumented migrants and other non-citizens. These collective vulnerabilities at the heart of the human security and international human rights intersection will be addressed at length in **Part 2** of this thesis. Of course, the framework of analysis proposed in this thesis could work to examine additional conditions of structural vulnerability afflicting other persons and groups. These two thematic cores, though, are highly relevant in societies of all levels of development and political regimes and it is submitted that they

exemplify in a representative fashion the potentials of the human security/human rights relationship to produce legal results of general significance, as further explained in Part 2.

For now, let us turn to the current understanding of human security to set the stage for a deeper examination of the implications of looking at human rights law through a human security lens.

I.5 The ‘common understanding’ of human security: 2012 and beyond

I.5.1 Second Report of the UN Secretary General on Human Security (2012)

The Report of the Secretary General, of April 2012, was prepared based on the formal and informal meetings carried out with Member States, under the coordination by the UNSG’s Special Adviser on Human Security, Mr. Yukio Takasu, as well as on written submissions by the General Assembly’s Member States. The Report confirmed the emergence of a level of consensus by which the concept of human security could be framed:

...Member States understood the notion of human security to encompass a people-centred, *comprehensive*, context-specific and *prevention oriented* framework through which *national capacities* could be strengthened. In addition, a number of Member States saw the added value of human security in *compelling* policymakers and practitioners to focus on the real needs and the multidimensional insecurities facing people today. As a result, a number of Member States considered that human security provided an *important lens* through which the United Nations can better address the *interface between security, development and human rights* in its activities.¹⁶²

In a similar way to the 1994 UNDP Report and the 2003 CHS Report, the 2012 Report of the UN SG depicts States’ consensus on the broad view of human security as focusing on widespread and cross-cutting threats to people’s *survival, livelihood and dignity*, in particular, the most vulnerable. Accordingly, human security draws attention to the root causes behind those threats (whether internal or external);¹⁶³ considers the impact of those threats on freedoms that are fundamental to human life -*freedom from fear, freedom from want and freedom to live in dignity*-; and highlights the actual needs, vulnerabilities and capacities of Governments and people.¹⁶⁴ These freedoms are

¹⁶² *Second Report of the UN Secretary General on Human Security*, UN General Assembly, A/66/763, 5 April 2012, “Follow-up to General Assembly resolution 64/291 on human security. Report of the Secretary General”, para. 13.

¹⁶³ However, this was of course not received without political discussion. In the UNGA follow-up meeting on the Report held on June 4, 2012, this was strongly contented by Iran, in arguing that the report actually did *not* address root causes of insecurity insofar as it did not mention the main actors provoking the lack of ‘global security’ and therefore left them unduly unpunished; see Statement by Mr. Mohammad Hassani-Nejad, Representative of the Islamic Republic of Iran on the Report of the Secretary General on Human Security, New York, 4 June 2012, at http://www.iran-un.org/index.php?option=com_content&view=article&id=995:tatement-by-mr-mohammad-hassani-nejad-representative-of-the-islamic-republic-of-iran-on-the-report-of-the-secretary-general-on-human-security-new-york-4-june-2012&catid=41:general-assembly&Itemid=54 Cuba also warned that human security would not be achieved as long as States kept on spending more on producing arms than on saving lives, and maintained an unjust and ineffective international economic order; see “Cuba advierte en ONU sobre amenazas a la Seguridad Humana”, en *Digital Granma Internacional*, La Habana, June 5, 2012, at <http://www.granma.cu/espanol/noticias/5junio-cuba-advierete.html> However, the UNGA in the end adopted a resolution in October 2012 which agreed on the general lines of the ‘common understanding’ proposed in the UNSG’s Report.

¹⁶⁴ *Second Report of the UN Secretary General on Human Security*, *op. cit.*, para. 24.

applicable to all people living under varied conditions of insecurity in developing and developed countries alike.¹⁶⁵

Because of this holistic position, the Report reflects a universalist and integrated interpretation on the human rights involved in the protection of human security, congruent with the current human rights normative and legal framework, not less so because the primary responsibility for assuring human security rests on the State. Indeed, human security “makes no distinction between *civil, political, economic, social and cultural rights* and as a result addresses threats...in a multidimensional and comprehensive manner. Accordingly, human security recognizes that the attainment of peace, development and human rights requires a comprehensive approach where the *interlinkages* and the *triangular relationship between security, development and human rights* are acknowledged”.¹⁶⁶

To stress and bring closer the linkages between security, development and human rights in the international arena would seem to move in the right direction. As was mentioned before, this trend is also observable to a certain extent in various global institutions.¹⁶⁷ However, the leap still has to be made from policy and global governance to International Law. In this sense, too often International Law has relied on the technical aspects of each of its many ramified disciplines or focused on ‘peak moments of conflict’, as David Kennedy puts it, while leaving aside the analysis and action in the face of structural conflict and inequalities. As he points out,

...a steady focus on “crisis” and “transition” and “intervention” has made it ever more difficult to pose questions about law’s role in the *quotidian structures of conflict and distribution* embedded in the economic and cultural global order. Rather than people taking responsibility for decisions, we imagine a drifting gauze of judicial networks and diffuse stakeholder conversations among a disembodied “international community” about what it might be legitimate to do about this or that unfolding crisis.¹⁶⁸

In an exercise that would seem to address some of these ‘quotidian structures of conflict and distribution’, in an interconnected rather than a diffuse and fragmented manner through the encompassing lens of human security, the UNSG Report identifies four key areas as fields in which UN bodies could work in a coordinated way to further human security:¹⁶⁹

- A. Climate change and climate-related hazard events
- B. Post-conflict peacebuilding
- C. Global financial and economic crisis and the Millennium Development Goals
- D. Health and related challenges

Still, the Report is careful enough to express States’ concerns in reassuring that human security is a ‘policy framework’ and does not generate new legal obligations.¹⁷⁰

¹⁶⁵ *Ibid.*, para. 36, (f).

¹⁶⁶ *Ibid.*, para. 26. Emphasis added.

¹⁶⁷ See for example *World Development Report 2011: Conflict, Security and Development*, issued on April 11, 2001, available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS.html>.

¹⁶⁸ Kennedy, David, “The Political Economy of Centers and Peripheries”, paper submitted for the Global Governance Debate at the European University Institute, Florence, Italy, June 28, 2012, p. 3 (forthcoming: 25:4 *Leiden Journal of International Law* 2012).

¹⁶⁹ *Second Report of the UN Secretary General on Human Security*, *op. cit.*, para. 37.

¹⁷⁰ *Ibid.*, paras. 14; and 36, (c) and (l).

As it can be seen, the four central issues identified as human security concerns have a direct bearing for women, especially those of health (think of the rates of maternal mortality and sexual and reproductive rights) and post-conflict reconstruction (think of resolutions 1325 and 1820 of the UNSC, referred to in Chapter III of this thesis). Also, UN Millennium Development Goal No. 3 –to be met by 2015- aims to “promote gender equality and empower women”,¹⁷¹ although a real cross-cutting gender perspective is left missing in the UNSG’s report. Within the MDGs, more specifically, target 3.A. refers to the core element of education, under the concrete goal to “Eliminate gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015”, a target towards which the world has already fallen short as revealed by the 2010 MDG Report.¹⁷²

Turning back to the UNSG’s report, the differential impact of the current global financial crisis on certain groups, particularly women, is also highlighted,¹⁷³ and the heightened vulnerability faced by poor migrant workers due to the multiple impacts of financial and economic shocks,¹⁷⁴ but not analyzing them in depth, nor mentioning the risks confronted by other non-citizens due to the economic crisis, such as asylum seekers and refugees,¹⁷⁵ thus giving relevance to the type of review suggested in Chapter IV of this thesis.

Certainly, the first issue of climate change and climate-related hazards relates to the realm of forced migration due to these causes, which has been extensively studied, partly in relation to the so-called new category of ‘environmental refugees’ and as well regarding the protection gaps generated by natural disasters which find no clear-cut legal framework to adequately cover the persons affected by them.¹⁷⁶ The harm caused to persons and communities by environmental risks

¹⁷¹ Millennium Development Goals, adopted by the UN General Assembly in 2000, available at <http://www.un.org/millenniumgoals/gender.shtml>. See also

http://www.unicef.org/gender/files/Strategic_Priority_Action_Plan_2010_to_2012.pdf

¹⁷² See United Nations, *The Millennium Development Goals Report 2010*, p. 25, available at <http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%20r15%20-low%20res%2020100615%20-.pdf#page=22>

¹⁷³ *Second Report of the UN Secretary General on Human Security*, *op. cit.*, paras. 49 and 51.

¹⁷⁴ *Ibid.*, para. 49.

¹⁷⁵ See for example Chetail, Vincent and Celine Bauloz, *The European Union and the Challenges of Forced Migration: From Economic Crisis to Protection Crisis?*, EU-US Immigration Systems 2011/07, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI), European University Institute, 2011. Already since 2003, the Commission on Human Security had alerted of a progressive “fatigue” with relation to refugees; see Box 2.3 “Compassion fatigue and humanitarian action”, in *Human Security Now*, *op. cit.*, for an account of the decrease in expenditures per refugee by the Office of the UN High Commissioner for Refugees (UNHCR) from \$25 in 1998 to \$19 in 2001 due to the significant decline in donor contributions to the UNHCR (although one should bear in mind that this analysis only presents the existing situation until 2001). See also Graham, David T. and Nana K. Poku (editors), *Migration, globalisation, and human security*, Routledge, London; New York, 2000.

However, since the UNSG Report reflects State consensus, these silences probably reveal States’ reluctance to commit further to human security in its legal dimension, at least at the general universal level.

¹⁷⁶ As one of the main comprehensive approaches in this area, see McAdam, Jane & Ben Saul, “An Insecure Climate for Human Security? Climate-Induced Displacement and International Law”, in *Human Security and Non-Citizens: Law, Policy and International Affairs*, *op. cit.*, pp. 357-403. See also Cooper, Michael D., “Migration and Disaster-Induced Displacement: European Policy, Practice, and Perspective”, CGD Working Paper 308, Center for Global Development, Washington, D.C., October 2012; a study that focuses on EU provisions, namely, the EU’s Qualification Directive, as well as its Temporary Protection Directive, which experts often point to as one instrument that may, in theory, provide a degree of protection to persons displaced by natural disaster, although in EU practice it has often failed to meet that need.

has also been examined under the umbrella of human security.¹⁷⁷ However, an overarching study on the conditions faced by other migrants and non-citizens viewed in terms of *risks* has not yet been fully undertaken, leaving undocumented migrants in general, especially those who do not fall into climate change/natural disaster-related categories, even more invisible and thus unprotected. In this context, in Chapter IV these circumstances amounting to *risks to rights* are analysed under a human security perspective in relation to the broader field of undocumented migrants and other non-citizens.

The more comprehensive potentials of human security revisited in the UNSG's 2012 Report were actually agreed upon recently by the UNGA, who confirmed the 'common understanding' of human security as including *all* human rights, its preventive character and the position of constructing and implementing it through peaceful means. These terms were agreed on in the debate of the UN General Assembly of the UNSG's Report held on June 4, 2012, and consequently adopted formally in a resolution of October 2012, by reaffirming that "human security is an *approach* to assist Member States in identifying and addressing *widespread* and *cross-cutting* challenges to the survival, livelihood and dignity of their people". The UNGA also considered that human security included

the *right* of people to live in freedom and dignity, free from *poverty* and *despair*. All individuals, in particular *vulnerable people*, are entitled to freedom from fear and freedom from want, with an *equal opportunity* to enjoy all their rights and fully develop their human potential.¹⁷⁸

So despite the heated debate at times tilted more towards examining humanitarian intervention, there is also a new opening -especially since the renewed UN dialogue and the 2012 UNSG's Report and its support by the UNGA- to discuss the proposed 'common understanding' of human security, its potentials, shortcomings and practical applications. Humanitarian intervention, important as it is, is a reactive stance limited to mass atrocities and involves the threat of using or the actual use of armed force.

There is however, a slightly different reading of this. In challenging the dominant vision that the 'freedom from fear' element of human security has over the years found expression in the R2P debate, and the human security position is left to deal with the socio-economic threats closer to the 'freedom from want' component, David Chandler argues that this view of the discussion is misconceived and fails to duly capture the myriad of applications human security has actually displayed in the 2000's as a resilience-building and agency-empowering mechanism.¹⁷⁹

What does seem clear is that human security holds a greater potential for societies in general, as the 'common understanding' also highlights, and not only for those struck with openly violent conflict or gross human rights violations that amount to humanitarian crises. Indeed, this is a key moment to study human security and legal scholars should not be absent at this time of proposals

¹⁷⁷ Falk, Richard A., "Global climate change, human security, and the future of democracy", in Gill, Stephen (editor), *Global crises and the crisis of global leadership*, Cambridge University Press, Cambridge, New York, 2011. See also Dalby, Simon, *Environmental Security*, *op. cit.*

¹⁷⁸ UN General Assembly, A/Res/66/290 "Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome", 25 October 2012, para. 3, a).

¹⁷⁹ See Chandler, David, "Resilience and human security: The post-interventionist paradigm", *op.cit.*, pp. 213-229.

on the table for its adequate definition, as well as the necessary mechanisms to make it more operational.

I.5.2 Human security and the ‘right to peace’

Due to its relation to human security, the ongoing debate on a *Draft UN declaration on the right to peace*, which builds upon the 1984 UN Declaration on the Right of Peoples to Peace,¹⁸⁰ also calls for a specific mention. This debate follows up on discussions on this theme developed in the 1980’s and 1990’s.¹⁸¹ It also resonates with some of the African legal instruments referred below in the present Chapter and studied in relation to women’s human rights in Chapter III. This recent Draft Declaration was presented to the Human Rights Council in June 2012, and includes in its article 2.1, a ‘right to human security’, phrased in the following terms:

Everyone has the *right to human security*, which includes freedom from fear and from want, all constituting elements of *positive peace*, and also includes freedom of thought, conscience, opinion, expression, belief and religion, *in conformity with international human rights law*. Freedom from want implies the enjoyment of the right to sustainable development and of economic, social and cultural rights. *The right to peace is related to all human rights*, including civil, political, economical, social and cultural rights.¹⁸²

With a slightly more legalistic approach than the UNSG’s Second Report on Human Security, the Draft declaration through its express mentions of International Human Rights Law and of human security as a right, seems to open the door for further analysis on the scope and implications of the right to peace, if fully articulated in the future as an autonomous human right. On the other hand, while it is not exactly clear if the 2012 *Draft declaration on the right to peace* conceives human security as equated to positive peace, suffice it to say that at present the UN Human Rights Council adopted a resolution on July 5, 2012 deciding to establish an open-ended intergovernmental working group with the mandate of progressively negotiating a draft UN declaration on the right to peace, on the basis of the draft submitted by the Advisory Committee.¹⁸³ In this respect, the right to peace and its precise links with human security is a developing field and the continuing discussions of the next few years will sketch out more visibly the picture of this relationship as envisioned by the international community.

In line with the view of this Draft declaration, not only negative peace as the mere absence of open violence, but also positive peace was given importance since the late 1980’s through emphasizing the elimination of the means of war as part of an ‘alternative security system’ through strategies of de-nuclearization, widening arms control, disarmament and accountability for certain types of

¹⁸⁰ *UN Declaration on the Right of Peoples to Peace*, General Assembly Resolution 39/11, 12 November 1984.

¹⁸¹ For a history of the development of the concept of ‘right to peace’ and the legal discussions surrounding it, see Kardos, Gábor, Chapter 9 “Right to Peace, Right to Development, Right to a Healthy Environment: Part of the Solution or Part of the Problem?”, in Rosas, Allan and Jan Hegelsen (editors, with the collaboration of Donna Gomien), *Human Rights in a Changing East-West Perspective*, Pinter Publishers, London and New York, 1990, pp. 216-240.

¹⁸² *UN Draft declaration on the right to peace*, contained in Human Rights Council, *Report of the Human Rights Council Advisory Committee on the right of peoples to peace*, A/HRC/20/31, April 16, 2012 and UNGA resolution A/HRC/RES/20/15, 17 July 2012.

¹⁸³ UN Human Rights Council, “Promotion of the right to peace”, A/HRC/20/L.16, June 29, 2012, and adopted on July 5, 2012.

grave crimes.¹⁸⁴ Contemporary accounts of the battle for de-nuclearization conclude that the achievement of human security is, indeed, the final goal.¹⁸⁵

But not only are the instruments of war to be addressed. Rather, a human security notion would also direct us to excavate one level deeper to tackle the “the *structural* causes of war and violence” and on the other side of the coin, the underlying causes for peace. As it has been noted, “for every thousand pages published on the causes of war, there is less than one page directly on the causes of peace”.¹⁸⁶

At the conceptual level, the right to positive peace may establish “an intellectual *linkage*...between *international law and the future of mankind*”,¹⁸⁷ as well as forming “a link between the principles of international law of peaceful coexistence of States belonging to different social systems, the fundamental rights of peoples to self-determination and the basic right of each individual to life”.¹⁸⁸

In its present wording, the proposal for a right to peace contained in the Draft Declaration is presented as a right of both individuals and peoples (and not only of peoples as the 1984 UN Declaration)¹⁸⁹ well as explicit concerns regarding State obligations to consider and take remedial measures regarding the specific effects of the different forms of violence on the enjoyment of the rights of persons belonging to groups in situations of vulnerability, such as women suffering from violence, as well as refugees and migrants, regardless of their nationality, origin or immigration status,¹⁹⁰ in the framework of broader context of development and socio-economic asymmetries, in line with the human security perspective and the thematic cores addressed in Chapters III and IV of this thesis.

Although human security may be viewed from different angles and disciplines -political science, critical security studies, international relations, development studies, have all done their job-, it is argued in this thesis that rather than giving way to parallel and somewhat unconnected discussions, it is more constructive to create synergies and complement on-going reflections in various fields.

¹⁸⁴ Kardos, Gábor, *op. cit.*, p. 220.

¹⁸⁵ See El Baradei, Mohamed, *The age of deception: nuclear diplomacy in treacherous times*, Metropolitan Books/Henry Holt and Co., New York, 2011.

¹⁸⁶ Blainey, Geoffrey, *The Causes of War*, Macmillan, London, 1983, p. 3.

¹⁸⁷ Kardos, Gábor, *op. cit.*, p. 223.

¹⁸⁸ Graefrath, Bernhard, “Priority to Right to Peace: on the 40th Anniversary of the United Nations”, in *GDR Committee for Human Rights Bulletin*, vol. 11, no. 2, 1985, p. 79, quoted in Kardos, Gábor, *op. cit.*, p. 223.

¹⁸⁹ *UN Draft Declaration on the Right to Peace*, *op. cit.*, Article 1.1.

¹⁹⁰ *Ibid.*, Articles 11.3 and 12. Efforts to apply the human security framework at the practical level for identification and prioritization of threats in a specific setting, conflict prevention and broad peace construction have been carried out by UNESCO at the regional level; see for example Rojas Aravena, Francisco and Moufida Goucha (editors), *FLACSO-Chile/UNESCO, Seguridad Humana, Prevención de Conflictos y Paz en América Latina y el Caribe*, FLACSO-Chile, Santiago, Chile, 2002; and Fuentes, Claudia F. and Francisco Rojas Aravena, *Promover la Seguridad Humana: Marcos Éticos, Normativos y Educativos en América Latina y el Caribe*, Facultad Latinoamericana de Ciencias Sociales – FLACSO, UNESCO, Paris, 2005. For reflection on the human security-peace relationship at the global level, see Aubin, Louise, “UNHCR and human security”, in Devin, Guillaume (editor), *Making peace: the contribution of international institutions*, translated by Roger Leverdier, Basingstoke, Palgrave Macmillan, New York, 2011. See also Schabas, William A., “Freedom from fear and the human right to peace”, in Keane, David and Yvonne McDermott (editors), *The challenge of human rights. Past, present and future*, Edward Elgar, USA/UK, 2012, pp. 36-51.

Scholars in international law are starting to also meet their task.¹⁹¹ Human security should not be left void of legal content and relevance when it has so much to do with the everyday protection of human rights -including notably in the legal arena -particularly those rights of the most vulnerable, human security's central concern.

I.5.3 A 'working understanding': a threshold-based definition as detonator for State action

In line with the wide-ranging 'common understanding' of human security proposed by the UN SG in his Report of April 2012 and agreed upon by the UNGA in October 2012, this text argues that a broad definition of human security, which encompasses all human rights, has many advantages. At the same time, it suggests that the incorporation of human rights standards may partly contribute in the task of better defining the scope of human security and providing tools for the assessment of concrete situations.

The evaluation as to which threats are to be considered in relation to which rights will depend on the critical and widespread nature of the risk affecting a certain right or set of rights and the level of vulnerability experienced by certain persons or groups, and this will determine the prioritization and course of action that the realisation of human security and human rights require in each context-specific case. The methodology to identify such risks factors and conditions of vulnerability would be built upon the quantitative and qualitative proposals reviewed in section I.4.1 above as those closer to a holistic human rights' appraisal and would go a step further in incorporating UN human rights indicators, as well as other sources of diagnosis such as reports by regional human rights bodies, national and local human rights institutions, and civil society documentation.

Still, the inclusion of the whole panoply of human rights in the sphere of human security preoccupation may raise reasonable concerns as to whether the notion we end up with is too broad to be workable. It is therefore worth exploring some attempts to surpass a narrow conception of human security, while at the same time searching for a functional definition that enables its practical use. In view of the ongoing efforts in the UN context to discuss the notion of human security this exercise seems particularly timely.

Concerned with the breadth of the term, Taylor Owen has proposed a threshold-based conceptualization, one rooted in the original UNDP definition that in his view offers a conciliatory way forward to what is often characterized as a fractured debate. He suggests that limiting threat inclusion by *severity*, rather than by *cause* (socio-economic vs. political) bridges the divide between the broad and narrow proponents, addresses the many critiques of the concept, and provides a clear policy agenda operating on various scales.¹⁹² Thus, based on the 1994 UNDP classification of insecurities as well as the idea of threats drawn by the 2003 Report of the Commission on Human Security, he provides a definition of human security as "the protection of the vital core of all human lives from critical and pervasive environmental, economic, food, health,

¹⁹¹ See for example Von Tigerstrom, Barbara, *Human Security and International Law. Prospects and Problems*, Hart Publishing, Oxford and Portland Oregon, 2007; and Edwards, Alice and Carla Ferstman (editors), *Human Security and Non-Citizens: Law, Policy and International Affairs*, *op. cit.*

¹⁹² See Owen, Taylor, "Human Security - Conflict, Critique and Consensus: Colloquium Remarks and a Proposal for a Threshold-Based Definition", in *Security Dialogue*, Vol. 35, No. 3, International Peace Research Institute, Oslo, Norway, Sage Publications, 2004, pp. 373-387.

personal and political threats”.¹⁹³ The 2012 UNSG Report subsequently agreed upon by the UNGA also provides for an integral understanding of human security as concerned with civil, political, economic, social and cultural rights. As to the criteria for drawing the line of the threshold (whether number of deaths associated to the specific threats or monetary costs to provide due protection, for example), Owen’s proposal is that this line is best seen as *political* and thus must be determined by political priority, capability and will. Acting in this way, he claims, the idea of human security may work “as a threshold beyond which a wide range of issues become something similar, something requiring the unified policy response granted to security threats”.¹⁹⁴

Supporting this threshold-based definition, Shahrbanou Tadjbakhsh has made the point that “Thresholds of human security are not to be defined in terms of isolated violent acts or by sporadic human rights violations, but as *structural* in nature”,¹⁹⁵ in parallel to what is argued in this thesis. The identification of a human security concern should then consider qualitative and quantitative indicators, turning to subjective security –what people perceive as the main threats affecting them-, and objective security -risk assessment based on external criteria-. But the exercise of identification is also political “as it points up a wide range of issues for the national and international actors who are responsible for providing human security as a public good. A threshold-based definition recognizes that certain threats cannot be dealt with by traditional institutions but are severe enough to require immediate action, both in the short term to handle the crisis and in the long term to prevent reoccurrence”.¹⁹⁶ Human rights indicators and standards can be of great relevance in identifying these issues that allow for drawing the threshold and that trigger the State’s human obligations, and the type of institutional responses required according to human rights criteria, as is developed in this thesis.

Thus interpreted, what the notion of human security mostly allows for is to identify situations of serious threats, which we could generically call *risk situations*. The factors that may come together in generating a risk situation might be several and can include the gravity of the violation of certain human rights; the widespread or systematic nature of a certain type of violations and/or the fact that the violations targets or has a disparate impact on what we could call a vulnerable population, meaning a population living in *structural* conditions of inequality or disadvantage, with a whole set of rights insufficiently guaranteed, and hence more susceptible to be severely affected by particular risk factors.

Owen underlines that the first opportunity and main responsibility for ensuring human security should fall on national governments,¹⁹⁷ a position confirmed by the recent Second Report on

¹⁹³ *Ibid.*, p. 383. Notice that the category of “community security” proposed by the UNDP is purposely not included in Owen’s definition. He defends the need to limit human security to critical and pervasive threats to the vital core, something he feels does not encompass the integrity of culture, footnote 17 on p. 383.

¹⁹⁴ *Ibid.*, p. 384.

¹⁹⁵ Tadjbakhsh, Shahrbanou, “Human Security: Concepts and Implications with an Application to Post-Intervention Challenges in Afghanistan”, in *Les Études du CERI*, N° 117-118 - September 2005, p. 9.

¹⁹⁶ *Ibidem.*

¹⁹⁷ However, Taylor Owen indicates that if threats crossing the human security threshold are caused by governments or if governments are unable to protect against them, the international community should carry out actions, “Human Security - Conflict, Critique and Consensus: Colloquium Remarks and a Proposal for a Threshold-Based Definition”, *op. cit.*, p. 384, but here one would be facing a scenario of possible humanitarian intervention, which is a whole other realm of proceedings as has been explained above. In any case, the criteria set forth in the UN Charter and Public International Law would have to be observed. One must keep in mind, though, that we are discussing two different concepts referred to two diverse stages, given that if humanitarian intervention - through the responsibility to protect or any other criteria- becomes necessary in a certain context, it is at a juncture in which a generalized condition of

Human Security by the UNSG, of April 2012, and confirmed by the UNGA in October 2012, as indicated above. Although the duty bearer for human security remains in the realm of public power as the adequate actor to guarantee the coordinated institutional mechanisms necessary for its protection, let us not forget that certain forms of “private” threats, such as those stemming from domestic violence and other forms of violence against women, should also be addressed by the State under the human security notion through a due diligence obligation, as this text argues in Chapter III. Regarding the realm of private power, one could also think of ongoing reflections on the role of transnational and other business corporations as creators or contributors to risk factors, conditions of vulnerability, and human rights violations, as signalled in the section on ESC Rights below.

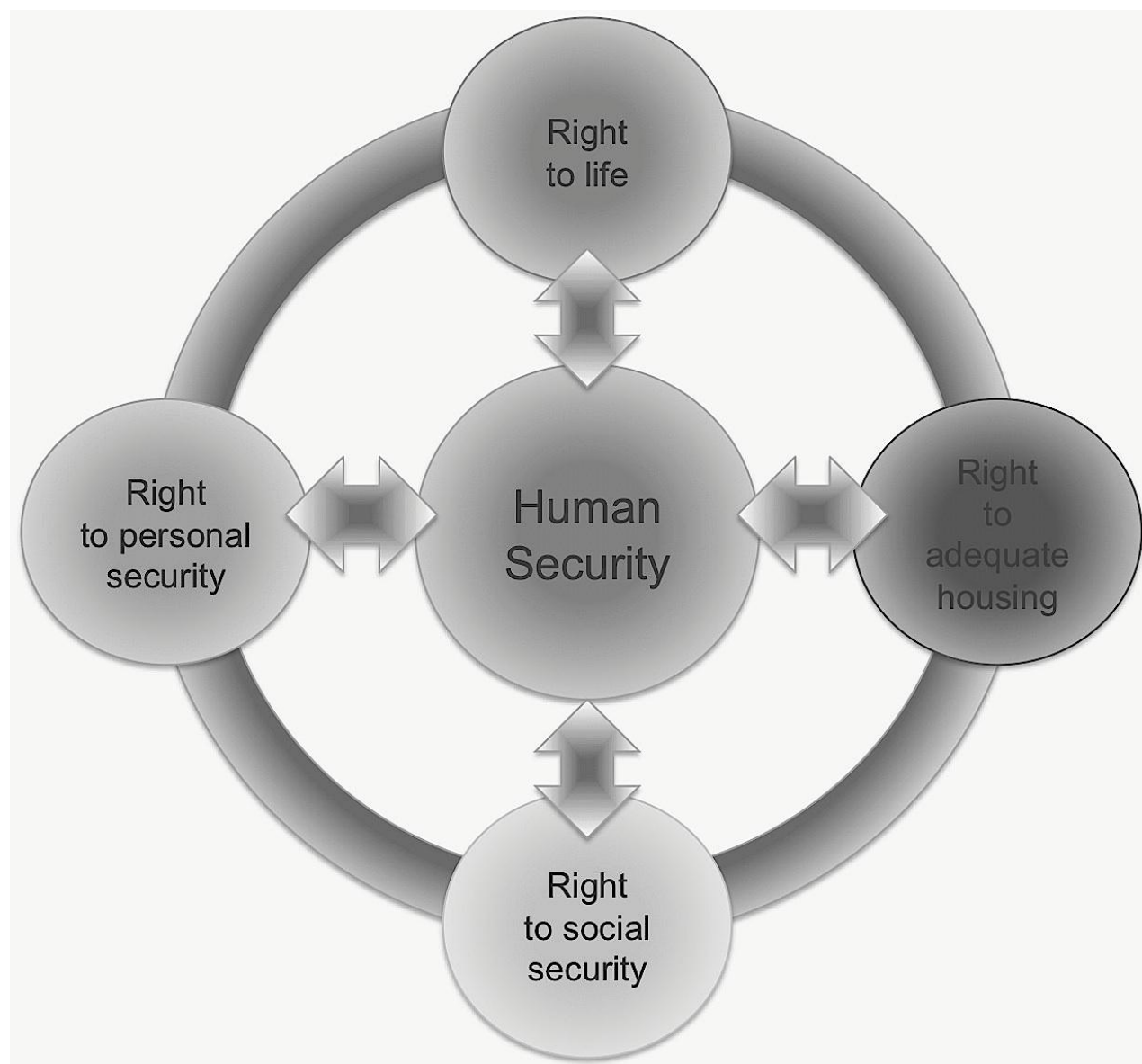
At the same time, let us keep in mind that the human security vision underlines equally strategies both of protection and of *empowerment*. In consequence, the identification of threats and the construction of norms and policies to address them, must involve community participation and civil society actors, through the assessment of their perceptions of risks and the best ways to build resilience to confront them. Indeed, being security an inter-subjective phenomenon, this social evaluation would constitute one of the two basic foundations of human security, the other being objective indicators relating to the different elements of the notion, such as development, respect for human rights and effects of violent or armed conflict.¹⁹⁸ It is at this crossroads that human rights law becomes a necessary tool for helping to illustrate the possibilities for civil society and State action and cooperation, as well as to define more clearly State duties that impact on human security, as will be described in the cases analysed in Chapters III and IV of this text.

This vision of human security, which does not primarily rest on the hierarchical ordering of human rights, would have a *bi-directional relation* to the concept of human rights, in the way represented in **Table 4** below:

human security has failed in relation to that population. Also, as Yukio Takasu, Special Adviser of the UN Secretary General on Human Security, pointed out in summarizing the positions expressed in the UNGA informal debate of 14 April, 2011: there seems to be consensus among Member States on the reaffirmation that, in line with the Charter, armed force could never be used in any way to further the goals of human security, making a clear distinction with the ‘responsibility to protect’, as has been explained above and confirmed by the UN SG’s Report of 2012 (Personal record taken at the informal debate of 2011).

¹⁹⁸ For example, from UN human rights mechanisms, the annual reports of Charter-based and treaty-based monitoring bodies; from international organizations, the Annual Human Development Index of UNDP, the World Development Report of the World Bank; from the academic and civil society sector, the Human Security Index, the Human Security Report Project, the Peoples Under Threat Report, the annual reports of Human Rights Watch or Amnesty International. Depending on the kind of threat and situation under review, the same type of analysis could be replicated at the regional, national or local level, looking at the equivalent institutions, and including national human rights institutions and judicial decisions by human rights courts in the applicable cases. See also *Human Security Handbook*, UNTFHS, OCHA, 2009.

Table 4



The relationship illustrated in **Table 4** above would work as follows: on the one hand, in order to identify risks properly and define where to draw the threshold line but also what type of State (or other) action is required, one would have to use as an indicator the levels of enjoyment of human rights and also rely on the protection standards delimiting State obligations in human rights law. To do this, more concretely, one would look at the sources of information that detect risks and highlight levels of enjoyment of human rights (or lack thereof) in concrete situations, as mentioned above. Diagnoses applying legal analysis to factual situations would include, for example, reports by UN and regional human rights mechanisms on country visits, such as those of Special Rapporteurs and treaty bodies, NGO reports, and Public Programs or Governmental Plans of Human Rights designed and implemented with the cooperation of the UN Office of the High

Commissioner for Human Rights.¹⁹⁹ The proposed examination would also take into account the normative standards contained in the jurisprudence and interpretative work that has been carried out by human rights mechanisms and courts.

On the other hand, in spelling out the human rights obligations deriving from risk situations, emphasis should be placed on the State's obligation to carry out primarily actions of *prevention*, as well as actions of *attention* and *mitigation*, against risks and vulnerabilities affecting people's overall level of security. The obligation of *reparation* under the human security notion should also be underlined, in cases in which the prevention, attention and mitigation failed, and the human rights violations were already produced. Such mechanisms of redress should be proportionate to the risk suffered and the vulnerability unattended, that is, in cases of structural vulnerability, the reparations should be consequently provided for in order to genuinely tend to the *repairing* of the damaged social environment which facilitated the human rights violations and to the *constructing* of collective and institutional conditions that allow for human rights' respect and protection. Some of these concrete potentials will be further detailed in the cases reviewed in Chapter III below. This would precisely be the contribution of taking a human security approach to the interpretation of human rights obligations as called for in situations of risk.

Given that the proposed conception of human security would look at the severity of the threat or condition of structural vulnerability in order to decide when there is a risk situation, the declaration of a risk situation would act as a "detonator" activating human rights' obligations of the State, especially to take preventive measures, to address the violations of human rights that have already taken place as soon as possible and to grant reparations that redress individuals and communities for the harm they have suffered while seeking to address the systemic shortcomings. In this sense, the idea of human security risk would function as a kind of "red alarm" or state of exception, but in an inverse way, meaning that the State would have reinforced obligations to prevent, protect and remedy in light of an endemic situation of violation human rights amounting to serious threats of basic human well-being.

This understanding of human security would have implications for poverty-stricken, marginalised or at risk sectors of the population, such as women and girls in danger of or experiencing violence, or undocumented migrants, both addressed in this text. As we will see, identifying severe threats to their basic well-being, whether they be linked to the variety of human rights that are often not adequately guaranteed, the seriousness or systematic nature of some of the violations they suffer, but also the compounded effect of the violations in situations in which they encounter multiple and structural forms of discrimination, promises to deliver a much more complex picture than the one provided by an analysis that looks at different individual human rights violations as separate events affecting isolated individuals. It also renders obvious the need to give due visibility to threats stemming from private actors, by reinforcing State *due diligence obligations* in view of the fact that, in situations of risk, the State *knew or should have known* about existing conditions of vulnerability.

¹⁹⁹ See for example those of Guatemala, Mexico (at the national level), and Mexico City, in: http://www2.ohchr.org/english/issues/plan_actions/docs/Guatemala2007-2017.pdf; <http://www.amdh.com.mx/ocpi/documentos/docs/6/27.pdf>; and <http://www.derechoshumanosdf.org/portal/>. For a general analysis on the construction of public policies with a human rights-based approach, see Vázquez, Daniel and Domitille Delaplace, "Public Policies from a Human Rights Perspective: A Developing Field", in *Sur – International Journal on Human Rights*, v. 8, n. 14, June 2011 (Biannual, English Edition), pp. 33-62, available at <http://www.surjournal.org/eng/conteudos/pdf/14/02.pdf>

Chapter II. Human security, international law and human rights

II.1 Introduction

One may broadly think of the normative and legal dimensions of security in trying to address the question of how the law responds to risk.²⁰⁰ Following from this, there are different points worth mentioning, even if briefly, in order to analyse the relationship between human security, human rights and international law in a globalized scenario.²⁰¹

In this respect, it has been noted that “international law has been largely silent, although the concept [human security] might well have considerable impact on its future development in some...key areas”, such as the understanding of security in international law, the creation of new norms, and the place of non-state actors in international law. Indeed, although “human security has left traces in these areas, the challenge to international law might well reach further and comprise both international law as an operating system (that is, its role as a “constitution” for international society) and the normative system (that is, the values and goals international law considers worth pursuing)”.²⁰²

Human security may also be important for international law in the determination and evaluation of the parties involved in a legal matter. Because of its people-centered view, it provides guidance as to the actors apart from the State, whose participation is relevant in relation to security and which would probably not be considered in traditional security strategies, for example, transnational corporations or non-State armed groups.²⁰³ Likewise, the concept of human security has recently been used as a parameter to evaluate the influence of other non-State actors, namely, religious groups and institutions, in the advancement or reduction of severe risks to human well-being, as players usually overlooked in human security reflection and policy, but actually impacting it quite significantly.²⁰⁴ This issue would also merit further analysis from the legal perspective given its impact on several matters relevant for international law.²⁰⁵ Human security could eventually be

²⁰⁰ For a series of essays on the subject of law and security, see Scheinin, Martin, *et. al.*, *Law and Security-Facing the Dilemmas*, EUI Working Paper Law 2009/11, European University Institute, Florence, 2009.

²⁰¹ For example, in relation the process of globalization and the way this has impacted human rights, the specific links between trade agreements, international investment law, arbitration and the human rights normative framework, has recently started to be examined. This field of increasing analysis will surely influence our understanding of the impact of these agreements and institutions on the enjoyment of ESC Rights and human rights in general, and the risks they are undergoing in the context of a globalized economy; see Dupuy, Pierre-Marie, Francesco Francioni and Ernst-Ulrich Petersmann (editors), *Human Rights in International Investment Law and Arbitration*, Oxford, Oxford University Press, 2009. This relationship may well be viewed also under the notion of human security, given that one of its focal points is the economic vulnerability of individuals due to sudden shocks and new phenomena such as global economic crises and global financial instability; see Griffith-Jones Stephany and Jenny Kimmis, “Human Insecurity of International Financial Volatility”, in *Human Insecurity in a Global World*, *op. cit.*, pp. 163-181.

²⁰² Oberleitner, Gerd, *op. cit.*, available in <http://www.accessmylibrary.com/article-1G1-132847591/human-security-challenge-international.html>

²⁰³ See Von Tigerstrom, *op. cit.*, p. 60.

²⁰⁴ See Wellman, James K. and Clark Lombardi, *Religion and human security: a global perspective*, Oxford University Press, New York, Oxford, 2012.

²⁰⁵ Think of the implications, for example, of the understanding of the human right to freedom of religion and belief and the recent contestations brought forward as to its interpretation and the scope of permissible State limitations on its exercise, presented in cases before the ECHR like *Leyla Sahin v. Turkey* (GC), Appl. No. 44774/98, 10 November 2005, and *Dahlab v. Switzerland*, Appl. No. 42393/98, Decision of inadmissibility, 15 February 2001. Discussion has also been formulated on the construction of the right to freedom of religion and belief by the UN HRC in its *General*

considered as an avenue to provide elements for an evidence-based assessment of the threat that religious dressing, manifestation or practice may pose to national security or other principles or interests considered worthy of State protection as justifiable aim to restrict the right to freedom of religion, an approach that has been generally lacking in the review of this right by the ECHR.²⁰⁶

Thus, generally speaking, if one looks at the human security agenda, many of its elements have been enclosed in one way or another by international norms and principles. The central component of human insecurity as the existence of risk and the related situation of vulnerability is dealt with in International Law through instruments directed to different groups of persons, for example, women subjected to discrimination and violence,²⁰⁷ or more recent concerns in the international arena, such as children in armed conflict.²⁰⁸ Indeed, “human security is defined by...international human rights norms, which give it content”.²⁰⁹

The study of other non-state actors could involve substantive analysis of human rights violations, for instance, by business corporations, as detailed further in the section of ESC Rights. Other procedural implications might involve accepting third-party or non-party submissions in the form of *amicus curiae*, for example, in legal proceedings affecting human rights, both before formal

Comment No. 22, Article 18: The Right to Freedom of Thought, Conscience and Religion, broadly as a non-discrimination provision, while the Committee says little of the core of the right itself which “is about much more than non-discrimination” and based on the wording of article 18 may actually require the need for State measures of accommodation; see Khaliq Urfan, “Freedom of Religion and Belief in International Law: A Comparative Analysis”, in Emon, Anver M., Mark S. Ellis and Benjamin Glahn (editors), *Islamic Law and International Human Rights Law. Searching for Common Ground?*, Oxford University Press, 2012, pp. 205-208. See General Comment No. 22 (Forty-eighth session, 1993): *Article 18: The Right to Freedom of Thought, Conscience and Religion*, CCPR/C/21/Rev.1/Add.4, 30 July, paras. 6-9.

²⁰⁶ For a reflection on the lack of an evidence-based approach in the ECHR cases, see Bhuta, Nehal, “Rethinking the Universality of Human Rights: A Comparative Historical proposal for the Idea of ‘Common Ground’ with Other Moral Traditions”, in Emon, Anver M., Mark S. Ellis and Benjamin Glahn (editors), *Islamic Law and International Human Rights Law. Searching for Common Ground?*, *op. cit.*, pp. 132-143. See also the increasing debate this subject has sparked in the U.S.: Senour, Hillary, “Expert finds religious freedom a matter of national security”, 16 November 2012, in which a former US diplomat stresses that because the threat to freedom of religion is so critical worldwide, the protection of this right should become “a core objective of U.S. foreign policy”; and “Papal nuncio: Catholic division undermines religious freedom”, 12 November 2012, that gives account of the Nuncio’s concern that “there is a concrete “menace” to religious liberty in the U.S....Evidence is emerging which demonstrates that the threat to religious freedom is not solely a concern for non-democratic and totalitarian regimes...Unfortunately it is surfacing with greater regularity in what many consider the great democracies of the world”; both pieces in *Catholic News Agency*, available at <http://www.catholicnewsagency.com/news/expert-finds-religious-freedom-a-matter-of-national-security/> and <http://www.catholicnewsagency.com/news/papal-nuncio-catholic-division-undermines-religious-freedom/>.

²⁰⁷ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted 18 December 1979 by the UN General Assembly resolution 34/180 and entered into force on 3 September 1981; and Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), adopted on 9 June 1994 at the twenty fourth regular session of the General Assembly of the Organization of American States and entered into force on 5 March 1995.

²⁰⁸ Optional Protocol to the UN Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted by UN General Assembly resolution A/RES/54/263 of 25 May 2000 and entered into force 12 February 2002.

²⁰⁹ OHCHR, “Acting High Commissioner for Human Rights, in Address to Security Council, Calls for Action Against Impunity in Congo-Kinshasa”, 7 July 2003, para. 7, available at <http://www.unhchr.ch/huricane/hurricane.nsf/view01/97B022B077EF167CC1256D5D0030A9B3?opendocument> In the same paragraph, the Acting High Commissioner emphasized that regarding that specific national context “the issue before us today is how to bring *human security through human rights* to the long-suffering people of the Democratic Republic of the Congo”. Emphasis added.

human rights bodies, as well as in other international bodies not formally engaged in human rights adjudication but actually impacting the enjoyment of any given human right(s). To give but an illustrative example, think of investment disputes before arbitration bodies that concern the human right to water.²¹⁰

In this sense, others point out that a notion of human security that is wholly informed by international human rights law, international humanitarian law, international criminal law and international refugee law, and which considers the relevant international legal norms prohibiting the use of force in international relations, will probably prove more valuable to international legal theory and practice in the longer term, than a notion of human security which does not meet these conditions because these areas of law embody the objectified political will of States.²¹¹

Following this line of discussion, this chapter portrays a set of reflections as to levels of encounter between human security and human rights and their effect in specific areas of international human rights law, in order to shed light on the ways in which human security can work together with human rights in promoting and also enhancing the values and goals of universal human dignity breathed into human rights' norms and standards.

II.1.1 International law, risk and vulnerability

The law should not, and often has not, remained indifferent in the face of risks confronted by persons and groups. Indeed, International Law has not been alien to the tendency of setting criteria for assessing risk and vulnerability and establishing mechanisms to prevent or ameliorate such conditions. This section sketches out the approach of International Law to *risk* and *vulnerability*, central elements of human security, as a general umbrella under which the development of security concerns as related to protection of persons has taken place, particularly through International Human Rights and Refugee Law. At the same time, it distinguishes these concepts from that of discrimination under human rights law, as bearing relevance for the human security reflection.

For the understanding of *risk*, let us first turn to its general conception under risk analysis in social science, which defines it as “the *possibility* of experiencing a negative outcome or a significant damage as a consequence of one (or more) factors (called ‘risk factors’)”.²¹² Likewise, risk analysis introduces the concept of *vulnerability* to explain how the effect of the same risk factor can be different for equally exposed individuals. In this sense, vulnerability gives an account of the distribution of a negative outcome on a population in relation not to the cause (the risk factor) that

²¹⁰ See for example the recent case of *Aguas del Tunari, S.A. v. Bolivia*, litigated before the International Center for the Settlement of Investment Disputes, ICSID Case No. ARB/03/02. For a full account, see Thielbörger, Pierre, “The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?”, in Dupuy, Pierre-Marie, Francesco Francioni and Ernst-Ulrich Petersmann (editors), *Human Rights in International Investment Law and Arbitration*, Oxford, Oxford University Press, 2009 (extract taken from edited digital manuscript).

²¹¹ See Sunga, Lyal S., “The Concept of Human Security: Does it Add Anything of Value to International Legal Theory or Practice?” in Frick, Marie-Luisa and Oberprantacher, Andreas (editors), *Power and Justice in International Relations. Interdisciplinary Approaches to Global Challenges*, Ashgate Publishers, December 2009, pp. 131-148.

²¹² Ranzi, Costanzo, “Social Vulnerability in Europe”, in Ranzi, Costanzo (editor), *Social Vulnerability in Europe. The New Configuration of Social Risks*, Palgrave Macmillan, 2010, p. 14. Emphasis added. See also such chapter for an examination of the differences between ‘old social risks’ and ‘new social risks’ in post-industrial European societies. Also from a sociological perspective, see more generally the work of Ulrich Beck, *Risk Society. Towards a New Modernity*, Sage, London, 1992.

determined it, but to the greater or lesser exposure of the population to suffering the consequences of this cause.²¹³ Thus, vulnerability can be characterized as the *degree of exposure to damage* that may result from a risk being actualized.

On the relevance of *vulnerability*, from a scholarly perspective, let us also turn to Martha Fineman who defines it as the characteristic that positions us in relation to each other as human beings and also suggests a relationship of responsibility between the State and its institutions and the individual. With such a definition, Fineman wishes to release the understanding of vulnerability from its negative aspect as a sign of exceptional weakness, and rather grounds her conception in the idea of vulnerability as a universal and constant feature of the human condition more generally.²¹⁴ Such a view seems close to the universal and egalitarian concern of human security as a concept covering risks and threats affecting all persons. Although vulnerability may admittedly be seen as a common human attribute, possibly more so than the classical liberal conception of individual autonomy, it must be kept in mind that different factors such as gender or legal immigration status, coupled with socio-economic deprivation, as reviewed in this text, may constitute structural conditions of risk that place some individuals or groups in a *higher degree of exposure to human rights' violations* –in a more vulnerable position- than others. Other factors such as *institutional precariousness* or lack of an effective State power may enter into the equation of the severe and critical threats considered by human security and often materializing into harm to human rights.²¹⁵

In terms of legal considerations, international law as a general stand has put forward considerations of *risk* and *vulnerability* as applied to situations, persons and groups that it deems worthy of a certain reinforced obligation directed to prevent harm, protect the affected subject if the risk is materialized or granting redress when an injury has already occurred -even when not always defining such conceptions in detail but rather leaving them open to legal interpretation by competent bodies. One may find different sources in international law that deal with risk and vulnerability. Certainly, international environmental law offers numerous examples of provisions developing different kinds of legal obligations –ranging from prevention and protection to guarantee- for States and other actors. This correlates to some of the specific types of human (in)security according to UNDP's classification, namely, environmental security and health security. To give but a few of these varied examples, instances of the vulnerability faced by people out of food scarcity have been considered in guidelines developed by the Food and Agriculture Organization.²¹⁶ Inter-governmental bodies such as the World Economic Forum have also taken up general 'human security' concerns, as well as actions regarding water security and food security.²¹⁷

In the conceptualization of risk under a human security notion, a reference must also be made to the relationship of human security to international humanitarian law (IHL). As the normative

²¹³ *Ibid.*, pp. 16-17.

²¹⁴ Fineman, Martha Albertson, "The Vulnerable Subject: Anchoring Equality in the Human Condition", in *Yale Journal of Law and Feminism*, Vol. 20, No. 1, 2008, pp. 8-9.

²¹⁵ See Turner, Bryan S., *Vulnerability and Human Rights*, Pennsylvania State University Press, University Park, PA, 2006, pp. 4-15.

²¹⁶ See Food and Agriculture Organization, *Directrices voluntarias de la Organización de las Naciones Unidas para la Alimentación y la Agricultura (FAO) sobre la gobernanza responsable de la tenencia de la tierra, la pesca y los bosques en el contexto de la seguridad alimentaria nacional*, 2009.

²¹⁷ See World Economic Forum, discussions on human security and its initiatives on water security (characterized as the water-food-energy-climate nexus), as well as agriculture and food security, available at <http://www.weforum.org/>

framework dealing with armed conflict, indeed some of the situations it envisions overlap with the human security concern. Because of the gravity of some of the circumstances described in the text, and the relationship they hold with the threshold of risk situation argued in section I.5.3 below as criteria to activate human security and human rights duties, an outlook could indeed be conceived from the standpoint of IHL. This thesis does, when applicable, partially analyse IHL or the humanitarian aspects of certain norms (for example, resolutions 1325 and 1820 of the UNSC on women in armed conflict and peace-building and peace-keeping contexts, as reviewed in Chapter III below). However, given that IHL is deemed as a regime of exception where narrower standards are applicable, the more ample perspective from the general standards of international human rights law (IHRL) is fitting to the holistic notion of human security upheld in this text, as one that contains at its core the protection of all human rights, civil, political, economic, social and cultural, as further explained in section II.1.1 on the relationship of human security and human rights within Public International Law. Indeed, since the main focus of the thesis is to explore structural and widespread conditions of vulnerability present at different levels in all societies, the perspective of IHRL has been preferred, precisely as the broader normative framework that opens the door for the most innovative questions in terms of the potentials of the human security notion, as argued below.

In this sense, it is within the realm of IHRL and international refugee law that the concepts of risk and vulnerability have proved to be of great relevance in their particular relation to human security, and thus will constitute the main focus of this section. In this respect, the two ideas of risk and vulnerability must be clearly distinguished from that of *discrimination*, which, within this text, will be understood in the terms defined by IHRL as *any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms*. Such prohibited grounds for discrimination include sex, gender, race, color, descent, culture, language, religion, political opinion, national or ethnic origin, immigrant status, disability, or any other status which has the mentioned intention or effect.²¹⁸

Discrimination, then, is to be understood as the *actual* unjustified distinction, exclusion, restriction or preference, different from risk and vulnerability in that these factors are situated in the realm of the *possible* or the *susceptible*. Of course, higher levels of exposure to risk, namely, vulnerability, may in themselves amount to discrimination, particularly indirect discrimination, as explained below. Non-discrimination, though, is both a specific right and a general principle under International Human Rights Law, while risk and vulnerability have been considered by such discipline as elements that may carry forth heightened State obligations (or inversely mitigated in cases of low risk or vulnerability). Indeed, in order for the right of non-discrimination to be fully realized for certain persons or groups, it may be necessary for the State to take certain positive measures or to ensure that they are taken, as will be specified below. This is rendered more evident

²¹⁸ UN Committee on Economic, Social and Cultural Rights (UN Committee on ESC Rights), General Comment No. 20, *Non-Discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2), E/C.12/GC/20, 10 June 2009, para. 7, in combination with the definitions of discrimination under Article 1 of ICERD; article 1 CEDAW; and article 2 of the UN Convention on the Rights of Persons with Disabilities. The Human Rights Committee comes to a similar interpretation in General Comment No. 18, paras. 6 and 7. On the right to non-discrimination on the basis of immigrant status, see also UN Committee on the Elimination of Racial Discrimination, *General Recommendation No.30: Discrimination Against Non Citizens*: 01/10/2004 (General Comments), available at Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies. Addendum, HRI/GEN/1/Rev.7/Add.1, 4 May 2005. Concepts and interpretations of discrimination against women as related to violence against women will also be reviewed in Chapter III of this thesis.

in the case of positive equality, the other side of the coin of non-discrimination, and the essential companion to the corresponding principle in international human rights law: that of equality and non-discrimination.²¹⁹

In this respect, there is also a growing awareness that natural disasters, or human created environmental harms, provoke *interrelated risks* not only to national security (as was considered some years ago with relation particularly to the lack of water), but also to the security of persons and communities, and consequently to their human rights. Think only of the recent catastrophes of the 2010 earthquake in Haiti or the oil leak caused by the explosion on a British Petroleum drilling rig in the Gulf of Mexico.²²⁰ Though even when reviewing natural disasters, one must be reminded that these natural phenomena do not only cause “natural” inevitable effects in an isolated manner. Rather, they are actually coupled with human-built social economic, political and legal structures that heighten or reduce people’s *vulnerability* accordingly. Indeed, “while ‘physical exposure’ to natural hazard hotspots increases vulnerability, a ‘lack of adaptive capacity’ is the main factor behind ‘hotspots of human vulnerability’”, and “when natural hazards do unleash their destructive powers, pre-existing socio-economic inequities manifest as vulnerabilities that ultimately determine both absolute and relative social outcomes and impacts”.²²¹ Structural factors may also determine the way legal responsibility for “natural” or human disasters is adjudicated or not and to which actors -all elements which the human security notion contributes to highlight.²²² Indeed, several environmental security accounts incorporate the human security proposal as part of a holistic approach to environmental challenges and to the way in which we understand the presence

²¹⁹ In this respect, see MacNaughton, Gillian, “Untangling equality and non-discrimination to promote the right to health care for all”, in *Health and Human Rights: an International Journal*, Vol 11, No 2, 2009, available at <http://www.hhrjournal.org/index.php/hhr/article/viewArticle/173/257>

²²⁰ The earthquake of January 12, 2010, that affected Haiti, the poorest country in Latin America, left tens of thousands and possibly hundreds of thousands dead and hundreds of injured people. This terrible result was caused not only by the earthquake itself, but mainly by the country’s ineffective health-care system and the weak institutional structure, incapable of facing the situation; see <http://www.nytimes.com/2010/01/21/world/americas/21death toll.html>. One can think also of the terrible environmental consequences of the oil leak in the Gulf of Mexico caused by the explosion in April 2010 on a British Petroleum drilling rig. This “ecological tragedy” harmed a huge amount of marine fauna in all of the Gulf of Mexico, effect of a transnational and multilayered risk, as emphasized by the idea of human security. However, in this case, the corresponding authorizations for BP’s drilling activities were issued by the US, a country which one would assume to have the necessary infrastructure and governmental coordination to implement risk prevention regulation. Notwithstanding, there are sources that indicate this implementation was too weak and even complacent, a fact which places questions regarding not only the legal matter of transnational corporations and human rights responsibilities, but also international State responsibility with respect to corporations acting under its jurisdiction, both of which are covered by the notion of human security. This seems to signal that democratic factors that also affect the existence or confrontation of dangers, such as good governance and transparency, can be present or absent depending on the context even in the developed world. This would reinforce as well the idea of human security as a universalist and egalitarian notion, given it considers risks that affect all and not only the elites, whenever there is an element of threat that creates vulnerability, such as in this case; see Von Tigerstrom, *op. cit.*, p. 52; Eilperin, Juliet, “U.S. exempted BP’s Gulf of Mexico drilling from environmental impact study”, in *The Washington Post*, 5 May 2010, in <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/04/AR2010050404118.html> and by the same author, “Interior Dept. official at MMS resigns” and “Independent probe of BP oil spill in works”, in <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/17/AR2010051702123.html>, 17 and 18 May 2010, respectively.

²²¹ Cooper, Michael D., *op. cit.*, paras. 23 and 27.

²²² See for example the “human security proposals” to guide response to natural or human-caused disasters, as opposed to neo liberal reactions, presented in “Conclusion: Envisioning alternatives: seven pragmatic proposals to advance human security in disaster assistance and recovery”, by Gunewardena, Nandini and Mark Schuller (editors), *Capitalizing on catastrophe: neoliberal strategies in disaster reconstruction*, AltaMira Press, Lanham, Md., 2008.

and actions of human beings in nature.²²³

Let us now look at some specific expressions in international human rights law that deal with sources of threat and exposure to harm, and seem to also confirm the understandings of risk and vulnerability mentioned at the beginning of this section.

A. *International human rights law*

Recent expressions of human rights bodies specifically adopt an interrelated view as the human security lens proposed in this thesis. For instance, the *Guiding Principles on Extreme Poverty and Human Rights*, adopted recently in 2012 by the UN Human Rights Council, highlight that:

Persons living in *poverty* are often *exposed* to both *institutional and individual risks of violence* and threats to their physical integrity from State agents and private actors, causing them to live in constant *fear and insecurity*. Continued *exposure and vulnerability to violence* affect a person's physical and *mental health* and impair his or her economic development and *capacity to escape poverty*. Those living in poverty, with little or no economic independence, have *fewer possibilities* of finding security and protection. Law enforcement agents often profile and deliberately target persons living in poverty...Moreover, poverty is a cause of *preventable* death, ill-health, high mortality rates and low life expectancy, not only through *greater exposure to violence but also material deprivation* and its consequences, such as lack of food, safe water and sanitation.²²⁴

In the UN arena, other outlooks involving the risk of persons to violence also point to an interrelated approach under the human security notion. The UN Special Rapporteur on Slavery mentioned 'human security' specifically in urging the Haitian government "to ensure the disarmament of individuals in Haiti to reduce violence and restore *human security* and social cohesion".²²⁵ At first glance it would seem that the Special Rapporteur adopts the more classical vision of security as absence of arms and thus reduction of risk to physical violence, also in line with the wider international legal movement on disarmament and small arms regulation, influenced by the human security notion as discussed in section I.1 above. However, taking a closer look allows for a more extensive reading by focusing on the link of human security to social cohesion that the Special Rapporteur advances. This would seem to view human security as a generalized state, a *facilitating environment* for the enjoyment of rights - as proposed in this thesis - , and does not narrow security to the absence of physical violence, but rather considers a set of collective conditions that reduce vulnerability and build resilience to make viable the possibility for people to live in dignity in a manner that is also sustainable in time.

Risk as a condition faced by individuals has also been dealt with through UN, European and African instruments. The Inter-American system has considered generalized situations of risk as deserving protection under refugee norms. Vulnerability as an additional aggravating element for

²²³ Dalby, Simon, *Environmental Security*, University of Minnesota Press, 2002, in particular, pp. 13-18; and 123-142. See by the same author, *Security and Environmental Change*, Polity Press, Cambridge, UK, 2009.

²²⁴ UN Human Rights Council, *Guiding principles on extreme poverty and human rights*, (contained in the basis of the Final Draft submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, UN General Assembly resolution A/HRC/21/39, 18 July 2012), endorsed by UN Human Rights Council in resolution 21/11 of 27 September 2012, para. 63.

²²⁵ Statement by Ms. Gulnara Shahinian, UN Special Rapporteur on Contemporary Forms of Slavery, its causes and consequences, to the UN Human Rights Council at its 12th session, 15 September 2009, p. 6.

consideration in human rights violations has been explored as well by several human rights mechanisms, including quasi-judicial and judicial bodies, as will be examined.

Expressed in human security language, certain ESC Rights also open the path for reinforced protection of persons in contexts of structural socio-economic vulnerability. The right of ‘everyone’ to *freedom from hunger*, for example, is specifically contemplated as the content of the right to food in article 11.2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).²²⁶ In further developing this right, the UN Special Rapporteur on the Right to Food has recently proposed criteria to guarantee ‘food security’ and a dignified life *free from hunger and free from fear*.²²⁷ As will be detailed below, risk is particularly considered in the Revised European Social Charter which includes in Article 30 a right to protection from poverty and social exclusion, that translates into a State obligation to take measures to promote the effective access “of persons *who live or risk living* in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance”.²²⁸ In the academic field, health security as a subtype of human security has been examined as well from the perspective of human rights law by Rebecca Cook, for instance.²²⁹

Apart from these specific provisions, in the arena of more general stands by human rights law, one may also find a first general approximation to risk in the procedural power granted to some international judicial bodies to issue an order of *precautionary, provisional or interim measures* that suspend the procedure on the grounds of the need to avoid an imminent risk of irreparable harm. This procedural competence evidences the consideration of risk as a condition worthy of legal consideration that may generate positive obligations for the State. In the case of the IACHR and the ECHR, this faculty has been used frequently.²³⁰

To provide an illustrative example relating to the thematic core of migration approached in Chapter IV of this thesis, let us refer to the case before the IACHR concerning the massive expulsions and deportations that Haitians and Dominicans of Haitian origin were being subjected to by the Dominican authorities, in cases wherein such activity endangered the life and the physical integrity of those deported as well as their family members left behind, particularly those minors that resulted abandoned. The Court then issued *precautionary measures* and ordered the Dominican Republic to adopt whatever actions could be necessary to protect the life and personal

²²⁶ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

²²⁷ See for example the press release on his country visit to Cameroon, Olivier De Schutter, UN Special Rapporteur on the Right to Food, “Cameroon: Stricter taxes for companies drawing on natural resources to better tackle hunger – UN Special Rapporteur”, 23 July 2012, where he stressed that “In Cameroon, *food security indicators* are on red alert despite measures taken in response to the 2008 food crisis and the increasing revenues drawn from the extensive use of its natural resources”, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12385&LangID=E>

²²⁸ Revised European Social Charter (RESC), CETS No. 163, opened for signature by the member states of the Council of Europe on 3 May 1996 and entered into force on 1 July 1999.

²²⁹ Cook, Rebecca J., “Human rights dimensions of health security”, in *97 American Society of International Law Proceedings*, 2003, pp. 101-106.

²³⁰ See González, Felipe, “The Experience of the Inter-American Human Rights System”, *op. cit.*, section D. Urgent Measures at the Commission and Court, pp. 123-124; and recent statistics on request and granting of interim measures by the ECHR under article 43 of the ECoHR in www.echr.coe.int; see also Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann in *N. v. UK*, at footnote no. 1 (*N. v. United Kingdom*, Appl. No. 26565/05, 27 May 2008).

and integrity of a series of concrete persons and to abstain from deporting or expelling from its territory one of the children involved in the case. It also ordered the State to permit the immediate return to its territory of one of the affected men so as to make possible the reunion between himself and his son.²³¹ This case dealing with the rights to nationality, legal personality and non-discrimination precedes what would later, in 2005, become a contentious case before the Court in the realm of both non-citizen and gender considerations, the *Case of the Yean and Bosico Girls v. Dominican Republic*, as will be examined in Chapter IV of this thesis.

On substantive grounds, the IACHR has also dealt with different groups as particularly vulnerable to human rights violations. In the *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*, of 1999, the Court considered children as especially vulnerable, and characterized children living on the street as *at-risk children*, a situation which compelled the State to take positive measures for enhanced protection under Article 19 of the American Convention, referred to the rights of the child, and interpreted in light of the UN Convention on the Rights of the Child.²³²

In facing the facts of five murdered street children, four of them tortured, presumably by police agents in 1990 in Guatemala City, the Court concluded that the State violated the rights of the child, as well as its general obligation to respect rights (article 1.1.), in relation to the rights to life (article 4), to humane treatment (article 5), and to personal liberty (article 7), of the children; as well as the rights to a fair trial (article 8.1) and judicial protection (article 25), of the children's families, based on the provisions of the American Convention. It also considered these grave occurrences as a violation of the right to personal integrity under articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

The Court framed the violations suffered by the five individual children and the members of their families against the broader social background prevailing at the time of the events, recognizing

as a *notorious and public fact* that...there was a *systematic* practice of aggression against 'street children' in Guatemala carried out by members of State security forces; this included threats, persecution, torture, forced disappearance and homicide.²³³

Thus, the Inter-American Court expanded the scope of positive obligations of protection to cases in which the State *knew or ought to have known* of such situations of systemic vulnerability. This criteria at work since the early stage of 1999, will be taken up by the Court in later cases of violence against women from 2001 onwards, and especially from 2009 to present date, addressing similar State obligations of prevention through the due diligence notion and transcending the

²³¹ See IACHR, *Provisional Measures, Haitians and Haitian Origin Dominicans in the Dominican Republic*, Orders of September 14, 2000; November 12, 2000; and May 26, 2001. Think also at examples of precautionary measures at the national level within procedures of legal or Constitutional protection of fundamental rights, for example, through the suspension of an arrest warrant affecting the right to liberty and security, or of an eviction order or a construction project as related to the right to housing, involving negative duties of the State. Orders of precautionary measures may also require the active intervention by the State to protect an individual's life or personal integrity and translate into positive obligations that the State must carry out.

²³² Inter-American Court of Human Rights, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Judgment of November 19, 1999 (Merits), paras. 185-191. Reference is made to the UN Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, and entered into force on 2 September 1990, in accordance with article 49.

²³³ *Ibid.*, para. 189, emphasis added. See also paras. 59 c) and 79.

traditional public/private divide to also cover State responsibility in cases of actions carried out by private parties in which the State was not directly the perpetrator of the violations, as will be specified in Chapter III of this thesis.

This expansive interpretation of the Court is also in line with general principles of interpretation of Public International Law. The Inter-American Court indicated that “when interpreting a treaty, not only the agreements and instruments formally related to it should be taken into consideration (Article 31.2 of the Vienna Convention), but also the system within which it is (inscribed) (Article 31.3)”. It related the criteria generally informing normative legal systems specifically to international human rights law, “which has advanced substantially by the evolutive interpretation of international protection instruments...consequent with the general rules of the interpretation of treaties embodied in the 1969 Vienna Convention...human rights treaties are living instruments, the interpretation of which must evolve over time in view of existing circumstances”. Under this reasoning, the Court concluded that both the American Convention and the UN Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention.²³⁴

In their Joint Concurring Opinion, Judges Cançado Trindade and Abreu-Burelli emphasized the interpretation of the Court and detailed the reasoning for the broad interpretation of the scope of the right to life of the street children as understood by the Court’s judgment:

The duty of the State to take positive measures is *stressed* precisely in relation to the protection of life of vulnerable and defenseless persons, *in situation of risk*, such as the children in the streets. The arbitrary deprivation of life is not limited, thus, to the illicit act of homicide; it *extends* itself likewise to the *deprivation of the right to live with dignity*. This outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights.²³⁵

The *Case of the Street Children v. Guatemala* of the IACHR resonates with the preoccupations expressed by the UN Committee on the Rights of the Child, (body in charge of reviewing State compliance with the Convention on the Rights of the Child and its Optional Protocols).²³⁶ The UN Committee has pointed out its concern (concretely in its State review of Togo) on the lack of measures taken to avoid ‘children at risk’, as the Committee calls them, including children living in extreme poverty or on the street, from becoming victims of sexual exploitation, pornography and trafficking, according to their obligations of *prevention* set forth in article 9, paragraphs 1 and 2, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The Committee goes further to also stress the links between gender-based discrimination and violence as a fertile ground for children, particularly

²³⁴ *Ibid.*, paras. 192-194. The sentence refers to the Vienna Convention on the Law of Treaties, adopted in Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, 2005, p. 331.

²³⁵ *Case of the “Street Children” v. Guatemala*, *op. cit.*, Joint Concurring Opinions of Judges A.A. Cançado Trindade and A. Abreu-Burelli, para. 4. Emphasis in first phrase in original. Emphasis in fourth and fifth phrase added.

²³⁶ Articles 43-45 of the UN Convention on the Rights of the Child; Article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict; and Article 12, paragraph 1, of the Optional Protocol to the Convention On The Rights Of The Child On The Sale Of Children, Child Prostitution and Child Pornography, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002.

girls, being placed at risk of sexual exploitation. Indeed, in analysing State obligations in this respect, the UN Committee specifically recommended that under the provisions of the Convention, the State should

Take effective measures to *identify* groups of children, including *girls, children living in extreme poverty and children in street situations, at risk* of being victims of the offences prohibited under the Optional Protocol, and provide them with the necessary support and assistance.

Eradicate gender-based discrimination and violence, and in particular repeal laws still in force that discriminate against women...²³⁷

Turning back to the Inter-American level, the Court has also addressed straightforwardly the State's obligation to take active measures to tackle risk in the field of socio-economic vulnerability. In the cases of *Yakye Axa v. Paraguay*, *Sawhoyamaxa v. Paraguay*, *Moiwana v. Suriname*, *Saramaka People v. Suriname*, and *Xákmok Kásek v. Paraguay*, involving indigenous and traditional communities,²³⁸ the Court stressed the risk and vulnerability arising out of extreme poverty coupled with the membership of persons to indigenous communities or minority ethnic groups, and interpreted the State's obligations regarding the rights to life, personal integrity and judicial protection, to encompass positive obligations to mitigate risk conditions in order to *prevent* violations to human rights and to adopt *protective measures* to confront such threats, thus affirming the State's reinforced obligation of protection. It also gave due regard to the communal conception of property of these groups as a condition that allowed them to confront risk and ensure the possibility of economic survival, building from its pivotal case of *Awas Tingni Community v. Nicaragua*, of 2001.²³⁹

In the 2006 case of the *Sawhoyamaxa Indigenous Community v. Paraguay*, involving non-citizens, namely internally displaced persons, Judge Cançado Trindade even gave life to a concrete mode of applying the human security/human rights symbiosis through judicial interpretation. In the case of *Sawhoyamaxa Indigenous Community v. Paraguay*, of 2006, based on an academic study on human security and human dignity, Judge Cançado reminds us that "The problem of internally displaced people...is actually a human rights problem. Displaced people are in a *vulnerable situation* precisely because of the fact they are under the jurisdiction of the State...(their own State) that did not adopt enough measures to *avoid* or *prevent* the situation of virtual desertion they came to suffer".²⁴⁰

²³⁷ UN Committee on the Rights of the Child, CRC/C/OPSC/TGO/CO/1, 8 March, 2012, Fifty-ninth session, held on 16 January – 3 February 2012, "Consideration of reports submitted by States parties under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Concluding observations: Togo", para. 21, c) and d).

²³⁸ IACHR: *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of June 15, 2005, Series C No. 124, para. 133; *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 28, 2007, Series C No. 172, para. 164; *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment of June 17, 2005, Series C No. 125, paras. 38.a, b, c, and d, and 39; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006 (Merits, Reparations and Costs); and *Xákmok Kásek Indigenous Community v. Paraguay*, 24 August 2010 (Merits, reparations and costs).

²³⁹ IACHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001 (Merits, Reparations and Costs).

²⁴⁰ IACHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006 (Merits, Reparations and Costs), Separate Opinion of Judge A. A. Cançado Trindade, supporting his argument on the work of M. Stavropoulou,

Similarly to the analysis of vulnerability done by the IACHR, the European Court of Human Rights (ECHR) has addressed the concern for vulnerable groups and until date, has characterized such groups basically as three, persons with mental disabilities, the Roma people, and asylum seekers.²⁴¹ Related to the thematic cores of this thesis, some of these cases involve elements of gender-based discrimination and more notably, of human rights violations in relation to race, ethnic and national origin. The case of asylum-seekers will be examined more closely in Chapter IV of this thesis, so let us now turn to view some of the assessments on vulnerability in cases concerning Roma people and persons with mental disabilities.

As some illustrative cases, *Connors v. the United Kingdom* may be recalled, where the Court concluded a violation of Article 8 (private and family life) deriving from the eviction of a gypsy man and his family from a caravan site viewed as lacking due protection of the gypsy way of life, considering the “vulnerable position of gypsies as a minority”. Similarly, in *Chapman v. the United Kingdom*, the Court concluded that there is a positive obligation of States under Article 8 to facilitate the gypsy way of life. In a more recent case, *Aksu v. Turkey*, of 2012, the ECHR evaluated whether Turkey complied with its positive obligation under Article 8 to protect the applicant’s private life from alleged interference by a third party, namely the author of a book and two dictionaries which were -according to the applicant’s claim- demeaning and offensive to the gypsy/Roma community and its lifestyle, and reflected anti-Roma racist sentiment. In this case, though, even when the Court recognized that the “*vulnerable position* of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle, both in the relevant *regulatory framework* and in reaching *decisions in particular cases*”, it concluded there had not been a violation, as the State had adequately balanced the applicant’s right to private life against the author’s freedom of expression, which prevailed.²⁴²

In the case of *Muñoz Díaz v. Spain*, of 2010, the Court had held precisely that “the *vulnerable position* of Roma means that some special consideration should be given to their needs and their different lifestyle both in the relevant *regulatory framework* and in reaching *decisions in particular cases*”, and in this instance concluded that the State had violated article 14 of the ECoHR (non-discrimination) in relation to article 1 of Protocol 1 to the Convention (peaceful enjoyment of possessions) by denying a Roma woman her entitlement to a pension on the basis of not recognizing the Roma marriage to her defunct husband (while such marriage had been accepted as valid through various acts by the Spanish authorities).²⁴³

"Searching for Human Security and Dignity: Human Rights, Refugees, and the Internally Displaced", in *The Universal Declaration of Human Rights: Fifty Years and Beyond* (eds. Y. Danieli, E. Stamatopoulou and C.J. Dias), Amityville/N.Y., Baywood Publ. Co., 1999, pages 181-182; at para. 14, footnote 20. Emphasis added.

²⁴¹ See the excellent article by Timmer, Alexandra and Peroni, Lourdes presenting and analyzing the classification of these three categories (forthcoming, 2012), “The Ability of Vulnerability in European Human Rights Law”, draft article presented at the seminar on Global and Transnational Human Rights Obligations, European University Institute, December 1, 2011.

²⁴² Cases by the ECHR: *Connors v. the United Kingdom*, Appl. No. 66746/01, 27 May 2004, para. 84 (emphasis added); *Chapman v. the United Kingdom* (GC), Appl. No. 27138/95, ECHR, 18 January 2001, paras. 92 and 96; *Aksu v. Turkey* (GC), Appl. Nos. 4149/04 and 41029/04, 2012, paras. 75; 61; and 81-89. Emphasis added.

²⁴³ *Muñoz Díaz v. Spain*, Appl. No. 49151/07, 8 December 2009 (Final 8 March 2010), paras. 61 and 69-71, emphasis added. Note however that quite disturbingly, the Court in the similar case a few months later of *Şerife Yiğit v. Turkey*, involving a woman’s claim for pension and health insurance as the surviving partner also in a non-civil marriage, in this instance a religious marriage under Islamic rite lasting twenty six years, resolved that there had been no violation of the same articles under analysis in *Muñoz Díaz*. Possibly explained by the difficulties arising out of the State’s public position towards religious authority, and not involving directly a consideration of vulnerability, the Court gave

In the prominent case of *D.H. and Others v. the Czech Republic*, for example, the Court acknowledged the concept of *indirect discrimination* in examining whether the disproportionately high placement of Roma students in schools for the learning disabled (“special schools”) in the Czech Republic was a violation of their right, under article 2 of Protocol 1 (right to education) read in conjunction with article 14 (non-discrimination) of the ECoHR, to be free from racial discrimination in the realm of education, concluding on that basis that the State was actually responsible for such violations and that it had a positive obligation to protect the Roma as a vulnerable people. The Court emphasized that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. The “lack of objective and reasonable justification” means that the impugned difference in treatment does not pursue a “legitimate aim” or that there is not a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised”.²⁴⁴ At times, though, this attention by the Court to vulnerable groups has not been uniform or wholly coherent, especially and disturbingly regarding cases of violence against Roma people.²⁴⁵

In the recent case by the ECHR of *Horváth and Kiss v. Hungary*, of January 2013, the Court found a violation of the right to education in relation to the right to non-discrimination, following the line of *D.H. and Others*, in this case affecting two Roma men who as children had been placed in “special schools” on account of a “mild mental disability”. In this case, the Court noted that Roma children had been overrepresented among the pupils at the remedial primary and vocational school attended by the applicants and that Roma children had overall been overrepresented in the past in remedial schools in Hungary due to the systematic misdiagnosis of mental disability. The underlying figures were uncontested by the Hungarian Government. This situation had to be seen *in the context of a long history of misplacement of Roma children* in special schools in Hungary and other European countries. While it could be argued that the situation resulting from the applicants being treated differently – the school assessment testing – might have a similar effect on other socially disadvantaged groups, there was nevertheless, at first look, a case of *indirect discrimination*. The Government therefore had to prove that that difference in treatment had *no disproportionately prejudicial effects*. It also concluded that Roma children were often “misdiagnosed because of *socio-economic disadvantage or cultural differences*”. In line with the

way to the margin of appreciation and concluded that there was “a reasonable relationship of proportionality between the impugned difference in treatment and the legitimate aim pursued [the principle of secularism]”, *Şerife Yiğit v. Turkey* (GC), Appl. No. 3976/05, 2 November 2010, paras. 85-88 and 100-102.

²⁴⁴ See ECHR, *D.H. and Others v. the Czech Republic* (GC), Appl. No. 57325/00, 13 November 2007, paras. 181; 175 and 196. For a recognition of vulnerability of Roma people and a violation through discrimination as related to the right to education, see also the similar case of *Oršuš and Others v. Croatia*, Appl. No. 15766/03, 16 March 2010. The Court had admitted the notion of indirect discrimination in a previous case of 2005, although the particular application in that case was declared inadmissible on the grounds of having constituted a State measure which was reasonably and objectively justified. However, the Court in reviewing disproportionate impacts of State decisions or policies on certain persons or groups (in this case women and their right to access to employment and social security), accepted that statistics alone could be enough to shift the burden of proof to the respondent state to provide an objective explanation of the differential treatment, setting forth that “where an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule –although formulated in a neutral manner– *in fact* affects a clearly *higher percentage* of women than men, it is for the *respondent Government* to show that this is the result of objective factors *unrelated to any discrimination* on grounds of sex”; *Hoogendijk v. the Netherlands*, Appl. No. 58461/00, Decision of inadmissibility, 6 January 2005, para. 8.

²⁴⁵ See Möschel, Mathias, “Is the European Court of Human Rights’ Case Law on Anti-Roma Violence ‘Beyond Reasonable Doubt’?”, *Human Rights Law Review* 12, no. 3, Oxford University Press, 2012, pp. 479-507, for an account of the reluctance of the Court to deal with these cases as racial discrimination cases under Article 14 of the ECHR, as well as a useful table that illustrates the Court’s response to such cases at p. 483.

human security blueprint, the judgment even contains a whole part dedicated to analyzing the “societal context” of the case (section 1.B).²⁴⁶ While this case is a ‘good case’ in terms of equality and non-discrimination on the basis of ethnicity and takes due regard of the context of vulnerability experienced by Roma people, doubts can be cast leading it to be considered as a ‘questionable case’ in terms of the human rights of persons with disabilities.²⁴⁷

With regard to the specific vulnerability of persons with *mental disabilities*, the Court has also based its assessment of this condition on their “past history of discrimination and prejudice” and clarified that this results in heightened obligations for the state when placing limitations on their rights. In the case of *Alajos Kiss v. Hungary*, it indicated that

“[I]f a restriction on fundamental rights applies to a *particularly vulnerable group* in society, who have suffered *considerable discrimination* in the past, such as the *mentally disabled*, then the State’s margin of appreciation is substantially narrower and it must have very *weighty reasons* for the restrictions in question....[T]he treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to *strict scrutiny*.”²⁴⁸

The recent accession by the EU as an organization -independently of its Member States- to the UN Convention on the Rights of Persons with Disabilities in 2010 (UN CRPD),²⁴⁹ its relationship with

²⁴⁶ ECHR, *Horváth and Kiss v. Hungary*, Appl. No. 11146/11, 29 January 2013, paras. 104, 105 and 115.

²⁴⁷ Although the case did not involve a specific disability-related analysis, it is quite unfortunate that the schools for children with mental disabilities were classified by the judgment as “inferior” (para. 115). The Court did so in referring to the Report on Hungary of the European Commission against Racism and Intolerance (ECRI) quoted in para. 75 of the judgment, although the ECRI did not describe such schools with that adjective. The ECRI did, however, generally criticize the existing system in Hungary noting that the “special” schools resulted “in low levels of educational achievement and a high risk of unemployment”). The Court “noted” the identification of the appropriate educational programme for the mentally disabled and students with a learning disability, especially in the case of Roma children, as well as the choice between a single school for everyone, highly specialised structures and unified structures with specialised sections was “not an easy one”, that it entailed “a difficult balancing exercise between the competing interests” [notice the use of interests and no mention of rights, in a similar manner than in *Nacic and Others v. Sweden*, as will be reviewed below in Chapter IV]. In the present case against Hungary, the Court “notes with interest” that the new Hungarian legislation intends to move out students with learning disabilities from special schools and provides for children with special educational needs, including socially disadvantaged children, to be educated in ordinary schools enabling the diminution of the statistical overrepresentation of Roma in the special school population (quotes from para. 127). While it is true that the Court was “not called on to examine the adequacy of education testing as such in Hungary”, the adequacy of these categorizations under human rights law could at least have been questioned. The recent accession by the EU to the UN Convention on the Rights of Persons with Disabilities in 2010, its relationship with the binding character of the EU Charter of Fundamental Rights for the EU and its reviewability by the ECHR, raises new normative questions as to the general design and functioning of an education system that may undermine the right of equal access to education of children with disabilities, and contain segregationist and discriminatory features when viewed under the innovative rights-based model advanced by the UN Convention; a fact which the ECHR seems unaware of in the present judgment, although the Convention had been in force for four years and for the EU specifically for more than two years. As seen throughout this text, the ECHR in other cases has made reference to UN and other international instruments for an authoritative or complementary basis of its argumentation, whereas in this case, the UN Convention was not even mentioned in the judgment’s paragraphs related to the subject (paras. 72-76), thus constituting a missed human security opportunity for reaffirming and harmonizing general equality and non-discrimination rights and for setting the stage for further definition of the threshold of protection of the rights of persons with disabilities in the European context.

²⁴⁸ ECHR, *Alajos Kiss v. Hungary*, Appl. No. 38832/06, 20 May 2010, paras. 42 and 44. Emphasis added.

²⁴⁹ The UN CRPD is, so far, the first and only core international human rights treaty to which the EU is a party, and the first human rights treaty which the European Community, as it then was, was involved in negotiating and signing. The European Community signed the UNCRPD on March 7, 2007 declaring that “the United Nations Convention on

the binding character of the EU Charter of Fundamental Rights for the EU and its reviewability by the ECHR, raises new normative questions and reveals interesting possibilities for legal interpretation. The CRPD considers persons with disabilities as right holders capable of exercising such rights in an independent manner on the basis of equal citizenship. The path is open to remain attentive as to how the standards of protection and fulfilment included in the innovative rights-based model of the Convention will interact with European standards and case law and how they will unfold in the future for persons with disabilities in the European context.

On another case-line, the ECHR dealt with an issue close to the human security concern, as related to its environmental dimension and the vulnerability experienced in the context of urban poverty. In the relatively recent case of 2004, *Oneryildiz v Turkey*, the Court emphasized the positive obligation of the State to take measures to *prevent risks*, particularly life-threatening ones, when it was knowledgeable of the existence of such threats. The case involved the explosion of a municipal rubbish tip which resulted in the loss of life of 39 people living in a contiguous irregular settlement, facts that led the ECHR to conclude that “there was *practical information available* to the effect that the inhabitants of certain slum areas...were faced with a *threat* to their physical integrity on account of the technical shortcomings of the municipal rubbish tip.” It further emphasized that “the Turkish authorities at several levels *knew or ought to have known* that there was a *real and immediate risk* to a number of persons living near the...municipal rubbish tip.”²⁵⁰

In the line of the illustrative normative standards and cases viewed above, this research is interested in the threats and vulnerabilities affecting people in their everyday lives, as highlighted by the human security notion and as a complement to the human rights cosmopolitan promise. Let us now turn to assess how everyday lives of refugees are impacted by the normative notions of risk that affect them.

B. International refugee law

Touching upon international refugee law and its two basic instruments, the 1951 Convention on the Status of Refugees and its 1967 Protocol, let us also recall that article 33 of the Convention sets forth an obligation of protection of persons facing a risk to their life or freedom for reasons based on their race, religion, nationality, membership of a particular social group or political opinion, through prohibiting States from expelling or returning them (*‘refouler’*).²⁵¹ In a complementary manner, article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECoHR), Article 3 of the Convention Against Torture and Article 7 of the International Covenant on Civil and Political Rights, all include an obligation of

the Rights of Persons with Disabilities shall apply, with regard to the competence of the European Community, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty, in particular Article 299 thereof”. It presented its instrument of formal confirmation on December 23, 2010.

²⁵⁰ See ECHR, *Oneryildiz v Turkey (GC)*, Application no. 48939/99, Judgment of 30 November 2004, paras. 98 and 101.

²⁵¹ Convention relating to the Status of Refugees, adopted on 28 July 1951 by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V), and entered into force on 22 April 1954. Protocol on the Status of Refugees, approved in New York on January 31, 1967 and entered into force on 4 October 1967, in conformity with article VIII. The Protocol opens up the definition of refugee of the 1951 Convention to universal application, by suppressing the reliance on occurrences having happened before 1 January 1951 and by eliminating any geographic limitation in the applicability of the 1951 Convention (given the 1951 definition is confined only to Europe).

protection of any person confronting a risk of torture or inhuman or degrading treatment, an obligation that is not subject to exception and constitutes *ius cogens*. Thus, both under refugee law and human rights law, risk of persecution and risk of torture or ill-treatment have become well-established conditions for triggering an obligation of protection from the State under the principle of *non-refoulement*.²⁵²

To give but a few orienting examples of the application of such obligations, to be explored in detail in Chapter IV of this thesis, we may find a reaffirmation of this principle in the realm of judicial interpretation of the ECHR. In *N. v. Finland*, a case of 2005 involving an applicant who had carried out services under President Mobutu of the Democratic Republic of Congo (DRC), and faced a possible expulsion from Finland (his country of residence), the Court deemed that the *risk of ill-treatment* to which the applicant would be exposed if returned to the DRC at the moment under consideration might not necessarily emanate from the authorities of that time, “but from relatives of dissidents who may seek revenge on the applicant for his past activities in the service of President Mobutu”. Thus, in a human security-sensitive approach that transcended potential time limitations to grant protection to the applicant, the ECHR concluded that “sufficient evidence has been adduced to establish substantial grounds for believing that the applicant would be exposed to a *real risk* of treatment contrary to Article 3, if expelled to the DRC at this moment in time. Accordingly, the enforcement of the order issued to that effect would violate that provision for as long as the risk persists”.²⁵³

The Court did consider a violation of Art. 3 in the case of *N. v. Finland*, although in the comparable case of *H.L.R. v. France*, decided previously in 1997, it had concluded there was not enough evidence of a substantive risk to a person to be deported back to Colombia. In this last case, the Court did not rule out the possibility that Article 3 may also apply where the danger emanates from persons or groups of persons who are not public officials and held that even in such a scenario it must be shown that the *risk is real* and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (in that applicant’s case against reprisals by drug traffickers). The *general situation of violence existing in the country* of destination (Colombia) would not in itself entail a violation of Article 3 in the event of the applicant’s deportation. In addition, the Court found no relevant or sufficient evidence to support the claim that his personal situation would be worse than that of other Colombians, were he to be deported.²⁵⁴ The shift towards a more protective standard at play in *N. v. Finland* suggests positive evolutions that may point towards an integral appreciation of the collective dimensions of risks and the consequent human rights obligations that emanate from a more human security friendly vision of individual cases that also considers contextual elements in its legal evaluation.

Circumstances causing a *generalized state of human insecurity* have also been dealt with by African and Inter-American instruments on refugees, transcending and complementing an individualist view of protection. Let us look at the Inter-American case, as an expression with a stronger human-rights based approach and “one of the most encompassing approaches to the

²⁵² See the analysis done by Duffy, Aiofe, “Expulsion to Face Torture? *Non-refoulement* in International Law”, *International Journal of Refugee Law*, 2008, Vol. 20, No. 3, pp. 373-390. See also American Convention on Human Rights, art. 22, para. 8; African Charter on Human and People’s Rights, art. 5.

²⁵³ ECHR, *Case of N. v Finland*, Application no. 38885/02, Judgment, 26 July 2005 (Final 30 November 2005), paras. 163 and 167.

²⁵⁴ ECHR, *Case of H.L.R. v. France (GC)*, Appl. No. 24573/94, Judgment, 29 April 1997, paras. 40-42.

refugee question”.²⁵⁵ The concrete context of some Central American countries like Guatemala, Nicaragua and El Salvador in the 1980s, torn by civil war and armed violence, provoked a shift in the legal answers provided by the regional system to the reality of massive flows of people seeking refuge. Indeed, structural situations, rather than only individual ones, were also included in the 1984 *Cartagena Declaration on Refugees*. Notably, although the broadening of the conception of refugee is analogous to that made by the former Organization of African Unity’s 1969 Convention on Refugee Problems in Africa -to cover those compelled to leave their country of origin on account of external aggression, occupation, foreign domination, or events seriously disturbing public order-, the Cartagena Declaration emerged not out of the regional system, but out of an *ad hoc* group of experts and representatives from Latin American governments that met in a colloquium in Cartagena, Colombia and adopted the Declaration, which was later endorsed by the OAS and the Inter-American human rights’ system.²⁵⁶

The text of the Cartagena Declaration explains what should be understood by refugee, as well as the sources and objectives of this expanded concept:

...in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider *enlarging the concept of a refugee*, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the *definition or concept of a refugee to be recommended for use in the region* is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their *lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights* or other circumstances which have seriously disturbed public order.²⁵⁷

This broadening of the definition of refugee, although contained in a ‘soft-law’ instrument, represents State endorsement of the applicable standards of protection and assistance and through the Inter-American human rights system such standards have actually become entrenched in the basic principles of asylum and the recognition of “the fundamental right of the individual to seek asylum from persecution and be heard in making that presentation”.²⁵⁸ Echoing the human security concern of freedom from fear, be it *generalized violence, internal conflicts, or massive violation of human rights*, the expanded Cartagena definition was a decisive tool in assuring in practice the effective protection of hundreds of persons deemed refugees, and thus, unfolding a set of consequent legal obligations deriving from that status. The focus on people placed in vulnerable conditions due to structural conditions affecting their basic well-being, allowed for a much broader and far-reaching scope of protection of persons, regardless of an individualized risk of prosecution to each one of them. This enhanced definition also set the basis for the reestablishment of refugees

²⁵⁵ Goodwin-Gill, Guy S. and Jane McAdam, *The Refugee in International Law*, Oxford University Press, third edition, 2007, p. 38.

²⁵⁶ *Ibid.*, pp. 37-38.

²⁵⁷ *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984.

²⁵⁸ IACoHR, “Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System”, OEA/Ser.L/V/II.106, Doc. 40 rev., 28 Feb. 2000, para. 118. See also Goodwin-Gill, Guy, *op. cit.*, p. 38.

in the host societies to ordinary living conditions which allowed for safeguarding their right to life and personal integrity and the enjoyment of the rest of their human rights more generally.

On a wider outlook concerning vulnerability of other groups, it should be noted that the phenomenon of collective stereotyping, demonization or criminalization of certain groups, through targeting or highlighting certain –real or supposed- characteristics of the group’s members,²⁵⁹ would seem to require responses that take into account collective dimension of the group’s vulnerable situation. Sadly, some of the expressions of collective stereotyping have come in the form of official measures exactly in the opposite sense of human rights law, for example, the collective expulsions of Roma people by the French government in 2011, which seem to echo some of the policies reviewed by the IACHR in the case of expelled Haitians or Dominicans of Haitian origin from the Dominican Republic, reviewed above.

It is true that human rights law and international law more generally have responded to this with the protection of group rights in some cases to be exercised by the collectivity itself and not the individual, think of the right to land by indigenous peoples, for example. Group protection has also taken form through International Criminal Law in the protective regime of the 1948 Genocide Convention and fifty years later in the 1998 Rome Statute, concerning national, ethnic, religious and linguistic groups. International law and several legal regimes at the regional and domestic level take group membership into account as one of the elements either for non-discrimination law or for direct protection measures understood more broadly as a mechanism for substantive equality.²⁶⁰ As was indicated above, the ECHR has worked on group vulnerability mainly on certain groups such as Roma people and asylum seekers. The IACHR has deepened on the analysis of socio-economic vulnerability as a cross-cutting feature transcending ethnic, religious or linguistic membership. The Inter-American region was also the first in considering violence against women as an endemic problem requiring a specific legal regime of protection, embodied in the 1994 Inter-American Convention on the subject, dealt with in Chapter III below.

It would seem, however, that certain political or social expressions of stereotyping, present in authoritarian regimes, but also in democratic ones, especially in times of economic crisis, escape the existing legal regimes or do not fully enjoy the characteristics for classical group rights legislation, and thus are left invisible, shadowed or unprotected. Thus is especially the case of undocumented migrants, as will be seen in Chapter IV of this thesis.

In the face of expressions of collective stereotyping, touching very closely the border-lines of racial or ethnic discrimination, a collective response which is more than the sum of individual sufferings or human rights violations, but rather an insight that duly weighs and connects these collective dimensions, is needed. One of the possibilities for such an insight is offered by the human security conception, understood in terms of the more precise definition of the 2003 report by the CHS, *Human Security Now*, and complemented by the 2012 UNSG’s *Second Report on Human Security*, as submitted in this text. Another one for further future exploration is that of using *public policies* with a human rights/human security-based approach, these measures being the archetypical tool to address ‘macro’ problems of a more collective and widespread nature.²⁶¹

²⁵⁹ See Timmer, Alexandra and Peroni, “The Ability of Vulnerability in European Human Rights Law”, *op. cit.*

²⁶⁰ See Lerner, Natan, *Group Rights and Discrimination in International Law*, 2nd edition, 2005.

²⁶¹ Work in the area of human rights as policy-prescriptive and orienting to confront structural challenges in the realm of action of the executive -transcending the classical study of judicial or legislative human rights’ protection- has recently started to be explored, especially in the Inter-American Human Rights’ System; see Vázquez, Daniel and

As explored above, some judicial decisions such as *Muñoz Díaz v. Spain*, for example, timidly start to refer to *regulatory frameworks* as possible necessary instruments to protect groups in condition of vulnerability and facilitate their lifestyle and consequent exercise of rights. The relationship between public policies and the fulfilment of human rights has also begun to unfold through its inclusion in certain wide-ranging normative instruments referring to women's rights at the regional level, as described in Chapter III below.

For now, let us retain the characterization of risk and vulnerability in International Law, as reviewed in this section particularly in International Human Rights and Refugee Law, as central elements of the human security concept that open the door to explore its connection with human rights.

II.2 Human security and human rights

To begin exploring the intersections between human security and human rights, one could question if the two can actually sit comfortably together, when the first is a notion developed originally in the field of development, political science, and international relations, and thus more useful in the public policy realm, whereas human rights enjoy a strong international normative architecture constructed mainly over the last sixty years and providing for legally binding obligations.

However, this would only be but a partial photography of the relationship. As we have seen, there are actually numerous legal and 'soft-law' expressions referring to human security, which display a normative content in their phrasing, as well as some binding obligations contained in regional and sub-regional instruments, all of which in a joint manner constitute a public basis for State action and social agency. Moreover, the involvement of legal scholarship in this analysis is called for given that human security, it is suggested in this text, even when viewed only as an orienting notion, has influenced human rights' legal norms and interpretation and holds potential to keep on doing so.

As it has been observed, in whichever of its conceptions, the fact is that human security plays a key function in international and national institutional arrangements, frequently related to the legal dimension of human rights. The evolution of human rights has had a great influence on the development of modern international law, and in this context it can be observed that human security, in the same way than human rights, holds a human-centered teleology, as opposed to prioritising state-focused goals.²⁶² Thus, both constructs, human security and human rights, serve common purposes and are therefore "mutually reinforcing".²⁶³

Within the UN arena, many and varied examples of the human security-human rights intersection may be found. In the more traditional security conception within human rights law, that of individual or personal security, we find several mentions of human security as an overriding

Domitille Delaplace, "Public Policies from a Human Rights Perspective: A Developing Field", *op. cit.*; and Abramovich, Víctor, "De las Violaciones Masivas a los Patrones Estructurales: Nuevos Enfoques y Clásicas Tensiones en el Sistema Interamericano de Derechos Humanos", in *Sur, Revista Internacional de Derechos Humanos*, vol. 6, no. 11, December 2009, pp. 7-40 (available also in English).

²⁶² See Cassese, Antonio, *International Law*, Oxford, Oxford University Press, second edition, 2005, p. 45.

²⁶³ Von Tigerstrom, *op. cit.*, p. 39. In this sense, see also Benedeck, Wolfgang, "Human Rights and Human Security: Challenges and Prospects", in Ferrándiz, Francisco and Antonius C.G.M. Robben (editors), *Multidisciplinary Perspectives on Peace and Conflict Research: A View from Europe*, University of Deusto, Bilbao, 2007, pp. 29-50.

concern that the State must consider when adopting, for example, counter-terrorism measures or those directed to crime-prosecution. Certainly, “Countering terrorism is...in itself, a human rights objective. The provision of human rights protection and the provision of security are not competing, but complementary obligations; not subsequent, but simultaneous obligations. They should be part of the same strategy to effectively protect the population, and part of the same obligation of the State to provide *human security*”.²⁶⁴ Navi Pillay, UN High Commissioner for Human Rights, considered as one of the three main potential impacts of the International Criminal Court (ICC) on the international system, the role of the Court in contributing “to peace and security, including *human security* -given that the grave crimes under its jurisdiction are conducts that ‘threaten the peace, security and well-being of the world’ ” as referred to in the preamble of the Rome Statute to the ICC.²⁶⁵

Apart from its implications for personal security as related to physical integrity, human security has seemingly been understood in the UN also as a broader concern within its strategy frameworks in certain national settings. As an example, the UN Somalia Assistance Strategy refers to the areas of “access to basic services, poverty reduction and livelihood, good governance and *human security*”.²⁶⁶ This strategic function of human security as a holistic concept for building international and State action would be confirmed by the current UNSG ‘common understanding’ of human security, reflected in his 2012 report and agreed upon by the UNGA as described above.

Indeed, as the 2003 CHS Report had already noted, “Human security helps *identify the rights* at stake in a particular situation. And *human rights* help answer the question: How should human security be promoted.”²⁶⁷

Despite the potential of the human security-human rights link as a mutually reinforcing symbiosis, as has been explained, while most human security ideas relate to human rights at the general or discursive level, they do not adopt a human rights-based approach when measuring levels of human security. In a similar way to the human rights-based approaches that have been suggested

²⁶⁴ UN OHCHR, Keynote remarks by Assistant Secretary-General for Human Rights, Ivan Šimonović, at the regional meeting on “Fair trial and due process in the counter-terrorism context”, 5 July 2012, Brussels, Belgium, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12367&LangID=E>. See also Ferstman, Carla, “The human security framework and counter terrorism: examining the rhetoric relating to extraordinary renditions”, in Edwards, Alice and Carla Ferstman (editors), *Human Security and Non-Citizens: Law, Policy and International Affairs*, op. cit., pp. 532-559; and Zwitter, Andrej, *Human security, law, and the prevention of terrorism*, Routledge, London, New York, 2011.

²⁶⁵ Navi Pillay, UN High Commissioner for Human Rights, “The ICC in the International System”, Remarks delivered during the event ‘Retreat on the Future of the International Criminal Court’, Liechtenstein, 17-18 October 2011, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11562&LangID=E>. Rome Statute of the International Criminal Court, adopted on July 17, 1998, 2187 U.N.T.S. 90, and entered into force on 1 July, 2002.

²⁶⁶ The United Nations Somalia Assistance Strategy lays out the framework for the engagement of the United Nations country team for 2011–2015 in such fields, and feeds into the integrated strategic framework; see “United Nations support to end human rights abuses and combat impunity in Somalia”, Report of the Secretary-General presented to the Human Rights Council, UN General Assembly Doc. A/HRC/21/36, 21 September 2012, para. 91. Notice the interesting link between the assessments of this document and the use of UN and NGO reports as sources of argumentation by the ECHR in the 2011 case of *Sufi and Elmi v. the United Kingdom*, regarding two non-citizens risking expulsion to Somalia, and its explicit mention of “food security” concerns in relation to the country in para. 113, and reference to the evaluations of the Food Security and Nutrition Analysis Unit of the World Food Programme at para. 188; see the whole range of sources employed in paras. 80-195 of the case: *Sufi and Elmi v. the United Kingdom*, Appl. Nos. 8319/07 and 11449/07, 28 June 2011.

²⁶⁷ *Human Security Now*, op. cit., p. 10. Emphasis added.

in relation to development, as well as in relation to ESC Rights,²⁶⁸ a human rights-based approach to human security -and moreover a gendered and human-rights based approach as will be analysed subsequently- would bear fruitful results, but has seldom been explored. In line with the recent emphasis on focusing on human rights implementation,²⁶⁹ the connection between human security and human rights under this perspective, would also contribute to the possibility of constructing public policies with a human rights-based approach, which include the aspect of *prevention* and *attention* to serious threats and risks that cause situations of structural vulnerability.

Human security and human rights share common values, they overlap and coincide in their interest of placing human beings at the center of concern. It has been argued in this text that their differentiating element is that of *serious threats or risk situations*, which help to highlight structural vulnerabilities and thus, the collective dimension of interrelated phenomena that transcends the analysis of individual human rights. In this sense, it does not seem appropriate when answering the question of which human rights should enter under the human security umbrella, to assert, as Von Tigerstrom does, that only a limited set of rights, those “basic rights” directly related to “survival, livelihood and dignity”, should be considered within human security.²⁷⁰

The point that could be raised is why is it necessary to make a distinction? The need for specifying rights would appear either to fall back into the classical hierarchical division between civil-political rights/ESC Rights, generally surpassed by now, or to point in favour of considering that all rights have a relationship with human security, in which case the distinction might not be necessary in the first place. Additionally, to adopt the first position of differentiating “basic rights” would seem somewhat dangerous given there already exists a legal regime, through International Human Rights Law and International Humanitarian Law, that defines the derogable/non-derogable rights in situations of peace and armed conflict, as explored further in the following section.

In trying to clarify the concrete ways in which human security and human rights differ and relate to each other, the 2009 UN handbook *Human Security in Theory and Practice*, points out that “too often gross violations of human rights result in conflicts, displacement, and human suffering on a massive scale. In this regard, human security underscores the *universality and primacy of a set of rights and freedoms that are fundamental for human life*. Human security makes no distinction between different kinds of human rights – civil, political, economic, social and cultural rights- thereby addressing violations and threats in a multidimensional and comprehensive way. It introduces a *practical framework for identifying the specific rights that are at stake in a particular situation of insecurity* and for considering the institutional and governance arrangements that are

²⁶⁸ See *The Millennium Development Goals and Economic, Social and Cultural Rights; a Joint Statement by the UN Committee on Economic, Social and Cultural Rights and the UN Commission on Human Rights’ Special Rapporteurs for Economic, Social and Cultural Rights*, November 2002, in <http://www2.ohchr.org/english/bodies/cescr/docs/statements/MDGandESCRs-2002.doc>; as well as Alston, Philip, former Special Adviser to the United Nations High Commissioner for Human Rights on the Millennium Development Goals, NYU Law School, Center for Human Rights and Global Justice, “A Human Rights Perspective on the Millennium Development Goals”, Paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development, 2004; and Alston, Philip and Mary Robinson, *Human Rights and Development: Towards a Mutual Reinforcement*, Oxford, Oxford University Press, 2006.

²⁶⁹ See Abramovich, Víctor, *Los estándares interamericanos de derechos humanos como marco para la formulación y el control de las políticas sociales*, Buenos Aires, Anuario de Derechos Humanos, 2006; and Stamford Consensus, *The Second Interagency Workshop on Implementing a Human Rights-based Approach in the Context of UN Reform*, available in <http://www.undp.org/governance/cdromhr/CountryReports/Morocco.ppt#2>

²⁷⁰ Von Tigerstrom, *op. cit.*, p. 43.

needed to exercise and sustain them”.²⁷¹

In this sense, and in line with the current ‘common understanding’ of human security reflected in the UN SG’s Report and the UNGA’s position of 2012, I have argued for an integrated approach that considers *all* human rights potentially at the center of human security, with no *a priori* definition of which one is to be taken into account and which one to be excluded. The differentiating element, the one that unites the two notions and therefore makes it significant both for rights and for security, is the component of *serious threats, vulnerabilities and risk situations*, as pointed out in the ‘working understanding’ (section I.5.3 above).²⁷²

In terms of such risk situations, let us now turn to explore the concrete ways in which International Human Rights Law has dealt with some of the different dimensions of security in conceptualizing them as rights.

II.2.1 Is human security a human right? A survey of security in human rights law

Turning to the State’s obligations within the international legal order, it can be observed that there are various international human rights instruments which refer to security, both at the UN and the regional levels. Let us take a panoramic view of the legal provisions in those spheres that cover security in its different understandings and links to human rights.

The Universal Declaration of Human Rights (UDHR),²⁷³ as well as the two main Covenants within the UN human rights system, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁷⁴ recognize the right to security in one way or another. Certainly, one of the most important legal intersections between the two concerns of human security and human rights is considering security (with no preceding adjective) as a human right. Let us turn to unpack what types of security does human rights law recognize.

The ICCPR acknowledges the “right to liberty and *security* of person” and indicates that no person “shall be subjected to arbitrary arrest or detention” nor “shall be deprived of his liberty except on

²⁷¹ See also United Nations Trust Fund for Human Security, *Human Security in Theory and Practice. Application of the Human Security Concept and the United Nations Trust Fund for Human Security*, Human Security Unit, Office for the Coordination of Humanitarian Affairs, United Nations. 2009, p. 9.

²⁷² In this same line, the United Nations Trust Fund for Human Security (mentioned above as one of the main institutional settings devoted to the practical implementation of human security globally), following the 2003 CHS Report has established as a conceptual basis that “At the core of life, there is a set of *elementary rights and freedoms (political, civil, social, economic and cultural)* that every individual must enjoy, irrespective of gender, race, ethnicity, or any other characteristic. *Without these basic rights, human security cannot be guaranteed...*[H]uman security underscores the close linkage between gross human rights violations and national and international insecurities. Furthermore, by making *no distinction between civil, political, economic, social and cultural rights*, human security addresses *violations and security threats in an integrated, multi-dimensional and comprehensive way* and provides a *practical framework* for identifying the *specific rights and obligations* that are at stake in a particular situation of insecurity”; see <http://ochaonline.un.org/humansecurity/QA/tabid/2188/language/en-US/Default.aspx>. Emphasis added. As explained above, this understanding is the one picked up by the UNSG’s Report of 2012 and presented for consideration of the UNGA.

²⁷³ Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, [General Assembly resolution 217 A \(III\)](#).

²⁷⁴ ICCPR and ICESCR, adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

such grounds and in accordance with such procedures as are established by law” (article 9.1).²⁷⁵ This provision has also been interpreted to protect the right to security of the person outside the context of a formal deprivation of liberty.²⁷⁶ The right to personal liberty and security is recognized as well by regional human rights instruments, in article 5.1 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECoHR); article I of the American Declaration on the Rights and Duties of Man (ADRDM); article 7.1 of the 1969 American Convention on Human Rights (ACHR or Pact of San José); and article 6 of the 1981 African Charter on Human and People’s Rights (ACHPR or Banjul Charter).²⁷⁷

On the other hand, the ICESCR recognizes in a broad way “the right of everyone to *social security*, including social insurance” (article 9) and prescribes the widest possible protection and assistance by the State to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children (article 10.1). It also stipulates the obligation of granting special protection to mothers during a reasonable period before and after childbirth and mentions that during such period working mothers should be accorded paid leave or leave with adequate *social security* benefits (article 10.2). Also, article 11.1 on the right to an adequate standard of living relates to social assistance and other needs-based mechanisms of social benefits in cash or in kind to anyone without adequate resources.

There is thus a narrow and a broad understanding of the right to social security, the first one relating more to income and situation-based ‘earned’ social security benefits of workers and their families usually in the form of cash benefits (also referred to as ‘social insurance’), and the second including also individuals or groups receiving need-based assistance from public funds, raised through tax revenues (‘social welfare’ or ‘social assistance’). In terms of international treaties, the right to social security has been interpreted in the latter manner to cover both types of social security as a *right*, more explicitly by the European Social Charter²⁷⁸ and through the interpretation of the UN Committee on ESCR in the forms specified below.

The right to social security or of non-discrimination in relation to social security, is also confirmed in other UN treaties, such as in various conventions of the International Labour Organization (ILO), the main one being the Social Security (Minimum Standards) Convention of 1952 (No.

²⁷⁵ Emphasis added. Emphasis added in this and all of the subsequently quoted instruments in this section.

²⁷⁶ See UN Human Rights Committee, *Dias v. Angola*, Communication 711/1996, UN Doc CCPR/68/D/711/1996, 2000, para. 8.3; and the case of *Delgado Páez v. Colombia*, Communication No. 195/1985, 12 July 1990, reviewed in more detail below; as well as the general analysis of the right to liberty and security of the person in Conte, Alex and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*, Ashgate, second edition, 2004, pp. 112-118.

²⁷⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECoHR), CETS No. 005, opened for signature by the member States of the Council of Europe on 4 November 1950 and entered into force on 3 September 1953; American Declaration on the Rights and Duties of Man (ADRDM), Organization of American States (OAS) Res. XXX 1948; American Convention on Human Rights (ACHR), OAS Treaty Series no. 36, adopted on 22 November 1969 and entered into force on 18 July 1978; African Charter on Human and People’s Rights (ACHPR), adopted on June 27, 1981, Organization of African Unity Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), and entered into force 21 October 1986.

²⁷⁸ See Scheinin, Martin, “The Right to Social Security”, in Eide, Asbjorn, Catarina Krause and Allan Rosas (editors), *Economic, Social and Cultural Rights. A Textbook*, Martinus Nijhoff Publishers, second revised edition, 2001, pp. 212-214. See for example European Committee on Social Rights, Conclusions XIX-2, Luxembourg, 22 December 2009.

102), although there are many more.²⁷⁹ This is possibly why the text of the ICESCR was drafted with a rather general content in dealing with social security, in light of the existence of well-developed ILO standards in the field and the possibility for ILO to continue exercising its faculties on standard-setting and implementation.²⁸⁰ With the 2008 General Comment on *The right to social security* of the UN Committee on ESC Rights, however, further criteria for the interpretation of this human right were provided from within the human rights world, given that the Committee specified the ‘Core Obligations’ of States in relation to this right.²⁸¹

Also, with the recent adoption of the 2008 Optional Protocol to the IESCR and its foreseeable prompt entry into force,²⁸² the existence of an individual complaints mechanism regarding violations of ESCR as explained in section II.2.4 below, may allow for the right to social security and the related right to an adequate standard of living to soon become fully justiciable also (or possibly primarily) within the realm of UN human rights protection mechanisms. This would open a door for subsequent interpretations of the core content of these rights in human rights understanding, not a minor task in the context of the current economic crisis.

Other UN human rights and human-centered instruments also include the right to social security in relation to specific groups: article 5,e).iv. of the 1965 International Covenant on the Elimination of Racial Discrimination (ICERD); articles 11 and 13 of the 1979 Convention on the Elimination of Discrimination Against Women (CEDAW); article 27 of the 1989 Convention on the Rights of the Child; article 27, 45 and 54 of the 1990 International Convention on the Rights of All Migrant Workers and Members of their Families (CRMW); article 24 of the 1951 Convention relating to the Status of Refugees; and article 24 of the 1960 Convention relating to the Status of Stateless Persons.²⁸³

This same right to social security is recognized in regional human rights instruments, in articles 12, 13, 16, 17 and 27 of the Revised European Social Charter (ESC); article XVI of the ADRDM; article 9 of the Additional Protocol in the Area of Economic, Social and Cultural Rights to the

²⁷⁹ See also ILO Conventions 35, 36, 38, 39, 40, 48, 67, 70, 71, 103, 118, 128, 131, 156, 157, 167, 165, 168 and 183, available at <http://www.ilo.org/ilolex/english/convdisp1.htm>

²⁸⁰ In this respect, see Scheinin, Martin, “The Right to Social Security”, *op. cit.*, pp. 214-215. The author also explains how the UN Committee on ESCR has used the ILO’s Reporting Guidelines as a reference point in its own work for defining State obligations.

²⁸¹ See UN Committee on ESCR, General Comment No. 19, *The right to social security (article 9)*, E/C.12/GC/19, 4 February 2008, paras. 59-61.

²⁸² As of the time of writing, nine States have ratified the Optional Protocol (OP), the most recent one being Portugal on 28 January, 2013. According to Article 18 of the OP, ten State ratifications are necessary for the entry into force of this instrument, a requirement that does not seem far away to accomplish given the current level of ratifications within the three and a half years after its adoption in December 2008.

²⁸³ International Covenant on the Elimination of Racial Discrimination (ICERD), adopted by UN General Assembly resolution 2106 (XX) of 21 December 1965 and entered into force 4 January 1969; Convention on the Elimination of Discrimination Against Women, adopted on 18 December 1979 by the UN General Assembly and entered into force as an international treaty on 3 September 1981 after the twentieth country had ratified it; Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990, in accordance with article 49; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted by General Assembly resolution 45/158 of 18 December 1990 and entered into force on 1 July 2003; Convention relating to the Status of Refugees, adopted on 28 July 1951 by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V), and entered into force on 22 April 1954; Convention relating to the Status of Stateless Persons, adopted on 28 September 1954 by the Conference of Plenipotentiaries convened by the Economic and Social Council Resolution 526 A (XVII), and entered into force 6 June 1960.

ACHR (Protocol of San Salvador); and article 18.4 of the ACHPR.²⁸⁴

Notably, the European Committee of Social Rights monitors compliance of Council of Europe Member States that have ratified the European Social Charter (43 States), and may decide complaints against those States that have chosen to accept the Committee's *collective complaints* procedures (currently 14 States).

Therefore, we may see the different contents determined for the right to security, depending on the nature of the Covenant and the values each one wishes to protect with regards to human dignity, in one case, more related to physical liberty and integrity, and in the other, more linked to social support networks and socio-economic well-being. However, these are both expressions of an individual right to safeguards and certainties enjoyable in different spheres of human life, in relation to which the State has positive obligations of protection.

These aspects of the right to security were originally conceived since the 1948 UDHR,²⁸⁵ which affirmed that "Everyone has the right to life, liberty and *security* of person" (article 3), and that "Everyone, as a member of society, has the right to *social security* and is entitled to realisation, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality" (article 22). It also set forth that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the *right to security* in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control" and that "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection" (article 25, 1. and 2.).

Security is also mentioned in both Covenants as a justifiable restriction to the exercise of certain rights, under the face of 'national security' and generally prescribing that these rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect *national security* in a democratic society, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the Covenant (articles 12.3; 13; 14; 19.3, a) and b); 21; and 22.2. of the ICCPR; and article 8.1,a) and c) of the ICESCR). However, it is important to note that the possibilities of using security of the State as a legitimate restriction of rights, was not mentioned at all in the UDHR, which sheds light on the fact that in the Cold War period in which the two Covenants were adopted, the political fear of threats posed by the exercise of rights such as liberty of movement, freedom of expression, right to information in the context of criminal proceedings or freedom of association (in the case of the ICCPR), or the right to form trade unions (in the case of the ICESCR), was probably higher than in the immediate aftermath of the war, or than (arguably) it is today, at least in the democratized world.

²⁸⁴ European Social Charter, CETS No. 035, opened for signature by the member states of the Council of Europe in Turin on 18 October 1961 and entered into force on 26 February 1965; and Revised European Social Charter (RESC), CETS No. 163, opened for signature by the member states of the Council of Europe on 3 May 1996 and entered into force on 1 July 1999; Additional Protocol in the Area of Economic, Social and Cultural Rights to the ACHR (Protocol of San Salvador), signed 17 November 1988 and entered into force 16 November 1999.

²⁸⁵ Adopted by the UN General Assembly on 10 December 1948, resolution 217 A (III).

Consequently, in legal terms, apart from these limited exceptions, State actions aimed at attaining security could consequently not override the human rights contained in International Law or other Constitutional or legal instruments at the national or local level. In an analogy to what occurs in the field of development, it seems useful to recall the Vienna Declaration and Programme of Action to the effect that "while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights" (Part I, para. 10). Similarly, in a holistic view of threats affecting persons and communities as that proposed by the human security conception, other concerns of a reductionist view of security, such as 'national' or 'military security' could not be argued as a basis for limiting or watering down international human rights, as it has been attempted in some contexts, for example, regarding indigenous peoples' rights.²⁸⁶

Following the human-centered view already described, if we understand security as the protection from severe threats, risks and sudden changes that can negatively affect the daily lives, rights and dignity of people, then we can consider not only the threats stemming from physical violence which harm the human rights to life, liberty or personal integrity, but we may also view security in relation to the risks to ESC Rights (whether they originate from violent conflict or not), as considered in the right to social security, for example.

In the realm of these last types of threats, worthy of noting is a provision in this precise sense in the Revised ESC. Apart from including autonomous rights to social security, education and housing, this instrument sets forth a provision that recognizes the interconnected nature of the rights affected by material deprivation and socio-economic marginalization, as well as the State positive obligation to also protect against the *risks* of falling into such a situation:

Article 30 – The right to *protection against poverty and social exclusion*

With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

to take measures within the framework of an *overall and co-ordinated approach* to promote the effective access of persons *who live or risk living* in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;

to review these measures with a view to their adaptation if necessary.

²⁸⁶ In the field of indigenous peoples' human rights, it has been pointed out that "Pitting security against the collective human rights of indigenous peoples would contradict existing international human rights law and be 'dangerous'. It could seriously jeopardize the notion of 'human security' [of such peoples]", that encompasses many elements, inter alia, physical, spiritual, health, religious, cultural, economic, environmental, social and political aspects; see Henriksen, J.B., "Implementation of the Right of Self-Determination of Indigenous Peoples Within the Framework of Human Security", in M.C. van Walt van Praag & O. Serro (editors), *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, Centre UNESCO de Catalunya, Barcelona, 1999, p. 226, quoted in UN Commission on Human Rights, Report of the second expert seminar "Democracy and the rule of law", Geneva, 28 February-2 March 2005, , Note by the secretariat, E/CN.4/2005/58, 18 March 2005, p. 15, para. 45. See Commission on Human Rights, Sixty-second session, E/CN.4/2005/WG.15/CRP.2, 24 November 2005, , Working group established in accordance with Commission on Human Rights resolution 1995/32, Eleventh session, Geneva, 5 – 16 December 2005, "General Provisions" of the Draft UN Declaration on the Rights of Indigenous Peoples, pp. 19-20.

Following a similar line, more recently *food security for women* has also been specifically considered a human right under article 1 of the 2003 Protocol to the ACHPR on the Rights of Women in Africa, the Maputo Protocol, as well as the right to peace for women, also close to the human security notion, as will be explained below in the section on regional conceptions. Also described in such section and following a similar line as the African idea, within the context of the OAS, the Inter-American States have adopted the OAS General Assembly adopted the Declaration of Cochabamba on “Food Security with Sovereignty in the Americas”²⁸⁷ and the resolution “Excessive commodity price volatility and its consequences for food security and sustainable development in the Americas”,²⁸⁸ which both endorse a broad idea of security as encompassing the human right to food.

In line with the human security conception, the UN Committee on ESC Rights has also affirmed the existence of a *right of tenants to security of tenure* as part of its interpretation of the right to adequate housing deriving from Article 11 of the ICESCR.²⁸⁹ Although not specifically contained in the Covenant, this right to security of tenure does arise from the legal interpretation of the competent supervisory body of these rights and thus constitutes an authoritative source to reason on the current understanding of one of the dimensions of security under human rights law, as detailed in section II.2.4 below.

Thus, under general International Human Rights Law as it stands today, there is legal basis to affirm that security is a human right, but limited to the *right of personal security* and the *right to social security*, as well as the *right to security of tenure* (derived through the interpretation of the UN Committee on ESC Rights). We should include also the *right to food security* as a general right in certain instruments of the Organization of American States and, more specifically, a *right to food security for women* in the regional binding legal framework of the African human rights’ system. However, to adequately capture the intricacies of the human security and human rights relationship, it is necessary to take a closer look at the fabric of which human security is made and review it in the light of the more general legal foundations of human rights.

II.2.2 Human security and human rights in public international law

As it has been observed throughout this and the previous chapter, apart from its expressions in development, political science or international relations, human security is also reflected in public international law through a series of treaties, norms and ‘soft-law’ instruments which expressly or implicitly contain it or refer to its key goals and spirit as a person-centered endeavour.

Within public international law, this text has also emphasized as one of its central concerns the area of international human rights law. To better understand this connection, let us refer to the sources of public international law and the way human security relates to them in the concrete sphere of human rights.

²⁸⁷ Declaration of Cochabamba on “Food Security with Sovereignty in the Americas”, AG/DEC. 69 (XLII-O/12), adopted at the fourth plenary session, held on June 5, 2012.

²⁸⁸ AG/RES. 2757 (XLII-O/12), agreed at the fourth plenary session, held on June 5, 2012.

²⁸⁹ See General Comments 4 and 7 of the UN Committee on ESC Rights, related to the right to adequate housing, as detailed in section II.2.4 of this Chapter.

According to Article 38.1 of the Statute of the International Court of Justice (ICJ), traditionally regarded as the foundation for the sources of public international law,²⁹⁰ the Court can decide the cases brought before it “in accordance with international law” applying:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.²⁹¹

Usually, the first three are regarded as primary sources of international law given the specific mention in point d. of judicial decisions and the teachings of the most highly qualified publicists (doctrine) as ‘subsidiary’ means for the Court’s legal determinations. Under this light, in terms of the sources of public international law, the content of the UDHR and both International Covenants of 1966 studied above –on Civil and Political Rights, and on Economic, Social and Cultural Rights, all three named the ‘International Bill of Rights’- are now generally considered binding international law, either directly through the obligations adopted by State parties in international treaties, or in the form of customary international law²⁹² or of general principles of law.²⁹³ This is of course relevant in the sense of determining the rights and obligations of non-parties of international human rights treaties at the State level, on the one hand, as well as the entitlements of individual persons or groups contemplated in international customary norms, on the other. Another important consequence of this affirmation is that “the recognition of human rights in customary law allows not only the treaty non-parties, but also the parties to have recourse to international law remedies not provided for in the treaties”.²⁹⁴

²⁹⁰ Schachter, Oscar, *International Law in Theory and Practice*, Martinus Nijhoff Publishers, The Netherlands, 1991, pp. 35-38. Note that this orthodox classification has been criticized from a feminist perspective: Hilary Charlesworth and Christine Chinkin argue that this formal categorization of sources and its defense by states, lawyers and academics have left new law-making and law-impacting bodies and procedures ‘outside’ the realm of law, normally to the detriment of women. They use the example of VAW to reveal the difficulty of opening traditional and mainstream views concerning the (valid) sources of international law, in *The Boundaries of International Law. A Feminist Analysis*, Juris Publishing, Manchester University Press, 2000, pp. 70-79. However, for the purposes of this section, such categorization will be followed as a way of using these sources as a starting point and then build from them to analyse the human security potential to point to “non-traditional” sources of evidence and argumentation in international law.

²⁹¹ Statute of the International Court of Justice (ICJ), annexed to the Charter of the UN, of which it forms an integral part, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>. The Charter of the UN, signed in San Francisco on 26 June 1945, is one of the constitutional texts of the International Court of Justice which was brought into being by the Charter. The Charter deals with the Court in Article 7, para. 1, Article 36, para. 3, and Articles 92-96, which form Chapter XIV. The International Court of Justice was established by the Charter, which provides that all Member States of the UN are *ipso facto* parties to the Court's Statute. The composition and functioning of the Court are organized by the Statute of the ICJ, and by the Rules of the Court which are drawn up by the Court itself.

²⁹² Schachter, Oscar, *op. cit.*, pp. 335-342.

²⁹³ See Meron, Theodore, “On a Hierarchy of International Human Rights”, in *The American Journal of International Law*, Vol. 80, No. 1, January 1986, pp. 1-23; see also the conclusion by the ICJ in the sense that ESC Rights are an essential part of human rights law to be complied with by States, even in the context of armed conflict; analysis of the ICJ’s Advisory Opinion of 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in section II.2.4 below.

²⁹⁴ Schachter, Oscar, *op. cit.*, p. 335.

In this respect, all human rights contained in these legal instruments, as a minimum standard, form an essential part of international law, and some of them, such as the absolute prohibition of torture developed in additional instruments and analysed in detail in Chapter IV of this text, even constitute peremptory norms of general international law, that is, *ius cogens* norms. Such norms are defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties as those which are “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Thus, they enjoy an absolute character and are non-derogable and opposable *erga omnes*, that is, their compliance can be claimed from the whole of the international community and not only from a specific State.²⁹⁵ As the ICJ has recognized, the reason behind this legitimate concern of all States is the nature of the issue at stake: “In view of the *importance of the rights* involved, *all States* can be held to have a *legal interest* in their protection; they are obligations *erga omnes*”.²⁹⁶

Following this line of thought, it has also been argued that *ius cogens* norms -in a similar logic than the basis of customary international law but with a higher degree of legally binding character- are immune to persistent objection by any given State or minority group of States. In this sense,

“it seems clear that there are elements of the present international legal system that are *not based on the consent of the states involved*...Jus cogens norms are seen...as a sort of superinternational law, trumping other forms of law and only able to be changed by the evolution of a new rule of jus cogens. Moreover, these norms are viewed as capable of [being] binding by all and against all (not just by and against those who have consented to the creation of the norms)”.²⁹⁷

Ius cogens norms have also been examined in light of human rights by concluding that “In the context of the sweeping language of human rights, *certain human rights principles* are recognized as jus cogens peremptory norms of international law. Jus cogens norms are fundamental tenets of international law considered accepted by and binding on all states, from which no derogation is permitted”.²⁹⁸

It could be then argued that other human rights, and certainly at least the core content of all human rights, including ESC Rights, have reached the level of *ius cogens*.²⁹⁹ Whether there is enough

²⁹⁵ Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, 2005, p. 331. See the analysis of *ius cogens* done by Alfred Verdross since the 1930s and revisited a few years before the adoption of the Vienna Convention in “Jus Dispositivum and Jus Cogens in International Law”, in 60 *American Journal of International Law*, 1966, pp. 55-82; see also a current examination in Duffy, Aiofe, “Expulsion to Face Torture? *Non-refoulment* in International Law”, *International Journal of Refugee Law*, 2008, Vol. 20, No. 3, pp. 373-390.

²⁹⁶ International Court of Justice, *Case Concerning The Barcelona Traction, Light and Power Company, Limited, Belgium v. Spain*, Judgment 5 February 1970, para. 33. Emphasis added.

²⁹⁷ Moises Penalver, Eduardo, “The Persistent Problem of Obligation in International Law”, in *Stanford Journal of International Law*, No. 36, 2000, p. 282.

²⁹⁸ Humes-Schulz, Stacy, “Limiting Sovereign Immunity in the Age of Human Rights”, in *Harvard Human Rights Journal*; No. 21, 2008, p. 110.

²⁹⁹ In this sense, see the convincing arguments on the right to health as *ius cogens* presented in Gunn, Patricia C., “Health Care Refugees”, in *Loyola University Chicago International Law Review*, Vol. 6, No. 339, Spring / Summer 2009. See also Galtung, Irene, *Lawyers or liars? Is world hunger suable in court?*, PhD Thesis in Law, European

evidence in this direction or if (some) human rights remain at the stage of customary international law or general principles of law as primary sources of international law, constitutes a debate which is not at the center of this thesis. What remains clear in considering the international legal norms referred to the rights and protection of human beings is that they now constitute one of the pivotal standpoints of the whole of public international law more generally. While traditionally International Law had been deemed as mainly regulating the relationships between States, as Antonio Cassese has pointed out, historical development shows that “international law increasingly covers issues of human rights and binds States not only among each other, but moreover States in respect to the persons subject to their jurisdiction”.³⁰⁰ This position is confirmed through recent work by Ruti G. Teitel, who recognizing a post-Cold War shift from the State to the human security perspective, has termed the cross points of international norms in human rights, humanitarian and criminal law, as *humanity’s law* more generally, and consequently has identified jurisprudential and normative expressions of a human security framework at work.³⁰¹

At the same time, it must also be acknowledged that the international legal framework of human rights itself presents gaps and shortcomings that are especially identifiable in the case of undocumented migrants and other non-citizens, and in some of the cases involving women and girls, as reviewed in this text. It is in these instances that human security can play its most powerful role, I argue, as an orienting and complementing concept to broaden the boundaries of International Law, to use Hilary Charlesworth’s and Christine Chinkin’s language, and provide tools for more expansive legal interpretations of human rights and reinforced protective measures for persons and groups living in conditions of structural vulnerability.

In this sense, since all human rights enter into and relate to the human security conception, in the ways explained in this chapter, and such human rights are recognized as primary sources of International Law, then human security becomes a ‘bridging concept’ able to connect these individual or group human rights and contribute to their legal understanding when viewed in an integrated manner, an issue that still requires further exploration, as is argued in this text.

II.2.2.1 Article 28 of the UDHR and human security: an enabling environment

Against this background, a special mention should be made of article 28 of the UDHR which sets forth that

*Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.*³⁰²

Similar phrasing is also used in the 1986 *UN Declaration on the Right to Development*³⁰³ and in

University Institute, Florence, 2011, who argues that the core content of the right to food, namely, freedom from hunger, is a *ius cogens* norm.

³⁰⁰ Cassese, Antonio, *International Law*, Oxford, Oxford University Press, second edition, 2005, p. 45.

³⁰¹ Teitel, Ruti G., *Humanity’s Law*, Oxford University Press, 2011, pp. 35-69; 105-138 and the analysis of the “human security turn” to global justice at pp. 139-164.

³⁰² Universal Declaration of Human Rights, 1948, *op. cit.* Emphasis added.

³⁰³ UN Declaration on the Right to Development, A/RES/41/128, 97th plenary meeting, 4 December 1986, Article 1, 1) and 2).

the more recent 2011 *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*. Although not a legally binding instrument, the Maastricht Principles constitute an authoritative source for debate given they were drafted and adopted by experts in international law and human rights from universities and organizations located in all regions of the world and current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the UN Human Rights Council. Moreover, they were thought of and discussed on the basis of the binding treaty of the ICESCR as understood in light of modern problems and challenges. The Maastricht Principles specifically contain in Article 29 a State ‘obligation to create an international enabling environment’.³⁰⁴

Thus, the idea of an enabling collective and global environment that facilitates the full realisation of human rights for ‘everyone’ seems to go in line with the human security notion -human security coming to the fore as a stage in which such realisation is at *critical risk*. Under human security, because of this risk situation, the ‘entitlement’ to this enabling social and international order is not actually being enjoyed by everyone or is at danger of being affected. As a result, State action, this text argues, should be taken for these threats to be prevented, ameliorated, due reparations granted, and further avoided, especially for those who are most vulnerable, a position that would strengthen the fulfilment of article 28 of the UDHR.

This article of the UDHR has been termed as an ‘intriguing provision’ in that it “seems to straddle the line between the substantive rights of the Declaration and the last few articles, which do not speak of rights themselves, but rather of duties and limitations”.³⁰⁵ Although not literally framed in terms of a ‘right’ but an ‘entitlement’, there is proof in the drafting history of this article to indicate that the original phrase used had been ‘everyone has the right’ but was later replaced by ‘everyone is entitled’ on a stylistic argument on the account that the terminology of rights was used two times in the article, but not pursuant to any substantial discussion on this issue.³⁰⁶ On this basis, for the effects of this thesis, I consider Article 28 as embodying a right to the content thereby expressed.

Article 28 would seem to also stem from the acknowledgement that human rights cannot be understood in a vacuum but that they are actually experienced in a determined social, economic and political context. Not only is the individual linked to the community in which she or he is born into or lives, but also at a broader level, in a world composed of States as the form of political organization *par excellence*, since 1948 the view was that one State is not isolated from the other, but that in fact an international order, a relationship between States (and/or other international actors), is to be found, and such order is an underlying factor for the realisation or not of an individual person’s human rights.

In this sense, article 28 “raises many questions...such as individual versus group and collective

³⁰⁴ *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, adopted on 28 September 2011. See also the analysis in Langford, Malcolm and Jeff A. King, “Committee on Economic, Social and Cultural Rights: Past, Present and Future”, in *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law*, edited by Malcolm Langford, Cambridge University Press, 2008, pp. 477-516.

³⁰⁵ Curtis, Josh and Shane Darcy, “The right to a social and international order for the realisation of human rights: Article 28 of the Universal Declaration and international cooperation”, in Keane, David and Yvonne McDermott (editors), *The challenge of human rights. Past, present and future*, op. cit., p. 9.

³⁰⁶ *Ibid.*, p. 12.

rights, and the duties of developed versus developing countries”.³⁰⁷ In what seems to be an answer to some of these questions, a recent publication addresses the duty-bearers of the right encompassed in Article 28 from the perspective of ‘international cooperation’, as an organizational principle in international law and as important aspect of human rights law, particularly in the fields of development and ESC Rights.³⁰⁸ Certainly, this issue can be approached from the standpoint of considering the fairness and suitability (or not) of the current international trading, economic and financial system as an ideal or even adequate forum for full human rights’ realisation according to Article 28, as well as through reviewing the role of transnational business corporations or other business enterprises, as the cited analysis and other recent UN documents have done, among others, the *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, also called The Ruggie Principles following their proponent’s name.³⁰⁹

Turning to the questions approached directly in this thesis, in looking at Article 28 of the UDHR, the right to an *enabling environment* leads us to human security territory and it can bring us to reflection on the *contextual and collective dimensions* of human rights’ realisation in people’s everyday lives. Such dimensions were conceived since the foundations of International Human Rights Law, as this article evidences, followed by both Covenants which take into account social and structural factors as was seen in the previous section, as well as other human rights legal instruments, for example, on violence against women or migrant workers, reviewed in Chapters III and IV of this thesis. Specifically in the field of women’s human rights, as will be seen in detail in Chapter III, certain instruments provide for the duty of States to take actions to comply with such rights within *an environment that guarantees safety and human security*.

Thus, it is submitted that human security as a *relational* concept may contribute to shedding light on such collective or societal aspects that at times are so unfavourable to human rights, and their nature so critical or widespread that they amount to risks or threats to the enjoyment of an individual or group’s human rights and can be characterized as potential violations to human rights or in some cases, as violations in themselves. This linking ability of human security in turn strengthens the principle of interdependence and indivisibility of human rights, as one of the axioms informing the legal interpretation of human rights contained in Public International Law as described above.

Human security in a *positive sense* then constitutes the existence of a series of societal conditions that allow for the respect, protection and fulfilment of human rights, a type of collective guarantee for their realisation; whereas in the *negative sense*, human security –or rather human insecurity–

³⁰⁷ Rosas, Allan, “Book Review. *Exploring Social Rights: Between Theory and Practice*, by Daphne Barak-Erez & Aeyal M. Gross (editors), Hart Publishing, 2007”, in *Israel Law Review*, Volume 42, Number 1, 2009, p. 209. I thank Judge Allan Rosas of the Court of Justice of the European Union for referring me to this review.

³⁰⁸ Curtis, Josh and Shane Darcy, *op. cit.*, pp. 10 and subsequent.

³⁰⁹ *Ibid.*, pp. 13-20. See Ruggie, John, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, presented in the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Human Rights Council resolution A/HRC/17/31, 21 March 2011, and endorsed by the UN Human Rights Council in June of 2011, in UN General Assembly Resolution 17/4 “Human rights and transnational corporations and other business enterprises”, 6 July 2011, O.P. 1. See also Estrada Tanck, E. Dorothy, *Régimen jurídico internacional de las empresas transnacionales en la esfera de los derechos humanos*, Breviarios Jurídicos, núm. 36, Editorial Porrúa, México, 2005; and Salomon, Margot E. and Ian Seiderman, “Human Rights Norms for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights”, in *Global Policy*, Volume 3, Issue 4, November 2012, p. 460.

points out the absence of such conditions in terms of the risks, threats and vulnerabilities that affect human rights and provides elements for their proper identification.

‘Human security’ as such has also been considered as “an emerging right”, which would consist of the individual’s claim to the protection against the seven types of threats correlated to the categories of insecurities identified by the 1994 UNDP Report.³¹⁰ From the stand of a *moral right* owed to people as a means to live free from fear, free from want and free to live in dignity, it is submitted that there is a valid ethical entitlement to human security as a necessary condition for the enjoyment of human rights. As has been described above, this ‘right’ is recognized as such by Member States of the UN General Assembly in paragraph 143 of the 2005 World Summit.

In a parallel way, human security could be characterized as a ‘programmatic’ right as in previous years Allan Rosas characterized the ‘right to political participation’, in the sense that although it does not yet provide for unequivocal and general obligations, it sets aspirations and new demands as societies change.³¹¹ Under that perspective, human security could be the flesh and bones of article 28 of the UDHR, a modern conceptualization in a globalized world of the original meaning of a right to a certain international and social order, a *facilitating environment*, for the fulfilment of all human rights by every person.

Following this view, human security could also contribute to the reflection on determining the non-derogable elements of human rights, the ‘core content’³¹² which may not be affected under any circumstance, and whose systematic violation or placing at risk produces a ‘disabling’ environment contrary to article 28 of the UDHR and related standards and provisions. The idea of a core content developed in human rights law is also close to the definition of human security adopted by the CHS in 2003, as the protection of the ‘vital core’ of all human lives, and later endorsed by the UNSG’s Second Report on Human Security of 2012, as explained in Chapter I above. This intersecting feature between human rights and human security opens the path for a deeper exploration of the legal implications of this relationship, while at the same time confronting the reasoned criticisms towards the human security conception for being too broad to be operational, as described also in the preceding chapter.

Consequently, let us turn to the differentiation between derogable and non-derogable rights or elements of rights. This classification has traditionally been defined, firstly, through the provisions

³¹⁰ Fernández Pereira, Juan Pablo, *La seguridad humana: un derecho emergente*, Ariel, Barcelona, 2006, pp. 107 and 118. This author also includes Violence Against Women as one of the necessary indicators to be developed in assessing a society’s level of human (in)security, as suggested in Chapter III of this thesis.

³¹¹ Rosas, Allan, “Democracy and Human Rights”, in *Human Rights in a Changing East-West Perspective*, *op. cit.*, p. 50.

³¹² The concept of ‘core content’ or ‘minimum core’ in the human rights legal framework has been developed in relation to ESC Rights, though it has been used in relation to other rights as explored in this section; see UN Committee on ESC Rights, General Comment No. 3, *The nature of States parties obligations (Art. 2, par.1)*, 14 December 1990, especially para. 10; see the ‘Core Obligations’ defined by the UN Committee on ESC Rights regarding the right to health in its General Comment No. 14, *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4, 11 August 2000, paras. 43-45. The Committee specifically stresses that these ‘core obligations’ are considered ‘non-derogable’; see para. 47. The concept of core obligations in human rights law has also been expressed more recently in the interpretation of a cross-cutting instrument covering both civil, and political, as well as ESC Rights, in General Recommendation No. 28 of CEDAW, *The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, 16 December 2010.

of International Human Rights Law (IHRL) itself.³¹³ In this respect, Martin Scheinin, for example, has studied Robert Alexy's model on rules and principles, and instead proposes to consider 'principles' and 'rules' as sharing the same value/goal and coexisting within the same legal order, but to view 'principles' as the surrounding parts of the 'core content' of a right, which can be understood as the 'rule' of the right with a specific scope of application. Thus, we may deem "the rule as the *inviolable core* of the right, whereas the other dimensions of the same right [the principle] would fall *outside the core* and be, for instance, subject to permissible limitations through a process of weighing and balancing".³¹⁴

Secondly, the distinction between derogable and non-derogable rights is also understood through the boundaries of IHRL as a general standard, and of International Humanitarian Law (IHL) or the rules of armed conflict and protection of civilians, as a standard of exception which comprises standards and non-derogable rights as defined in common article 3 of the 1949 Geneva Conventions on *minimum* applicable standards in armed conflict and related provisions and interpretations.³¹⁵

Rather than examining the differences between relevant standards in armed conflict and non-armed conflict contexts and their implications already dealt with extensively in legal scholarship,³¹⁶ in line with the concrete goals of this thesis, an exploration of the link between human security and the *core content* of rights is called for in light of human security's potential to highlight interrelated elements of structural risk or vulnerability and incorporate them into the analysis of such essential content.

In this respect, human security could serve a purpose in advancing a protective interpretation of human rights in general and the non-derogable elements of said rights in particular (see also **Table 5** at the end of this section). This would not substitute the set of rights to be upheld in each given

³¹³ See for example Article 4 of the ICCPR on states of emergency and the non-derogable rights under the Covenant: articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 (life, freedom from torture, freedom from slavery, prohibition of imprisonment for non-fulfillment of contractual obligations, due process rights in criminal law, equality before the law and freedom of thought, conscience and religion, respectively). See also Article 4 of ICESCR that indicates that "States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society".

³¹⁴ Scheinin, Martin, "Terrorism and the Pull of 'Balancing' in the Name of Security", in Scheinin, Martin, *et. al.*, *Law and Security-Facing the Dilemmas*, EUI Working Paper Law 2009/11, European University Institute, 2009, p. 55. Emphasis added.

³¹⁵ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War; all adopted in Geneva on 12 August 1949, and entered into force on 21 October 1950; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), both adopted on 8 June 1977 and entered into force on 7 December 1978; as well as Protocol additional to the Geneva Conventions of 12 August 1949 relating to the Adoption of an Additional Distinctive Emblem (Protocol III), adopted on 8 December 2005 and entered into force on 14 January 2007; see also International Committee of the Red Cross, at <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>

³¹⁶ See for example Schachter, Oscar, *op. cit.*, Chapters VII and VIII; and Remiro Brotons, Antonio, *Derecho Internacional*, Tirant lo Blanch, Valencia, Spain, 2007, Chapters XXIX, "La protección internacional de los derechos humanos", and Chapter XXX, "El Derecho Internacional Humanitario/Los crímenes internacionales", on the differences and relationship between IHRL and IHL.

context, including those of armed conflict, generalized conflict situation or state of emergency. It would, however, allow for consideration of risk situations, particularly structural ones, affecting the core content of rights which the State *knew* or *ought to have known* about and, consequently, to provide more extensive criteria to trigger its obligations of prevention, taking measures and/or granting reparations.

To give an example of a protective standard-setting exercise, the UN Human Rights Committee in its General Comment No. 29, *States of Emergency (article 4)*, offered a progressive interpretation by considering that the requirement of court review over the lawfulness of detention constitutes a *non-derogable element* in Article 9 of the ICCPR, even when this article is not referred to in Article 4, para. 2, of the ICCPR, as a non-derogable right during a state of emergency.³¹⁷

Human security then could prove useful in analyzing the non-compliance of the State with *positive obligations* of taking measures directed to *risk prevention and attention* and it may provide guidance with regard to the causes of violations of rights, through *actions* or through *omissions*, especially concerning these positive obligations. For instance, in the famous *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, of 2001, regarding State action damaging to the collective property of an indigenous community, the IACHR indicated that according to “the rules of law pertaining to the international responsibility of the State and applicable under International Human Rights Law, *actions or omissions* by any public authority, whatever its hierarchic position, are chargeable to the State”.³¹⁸

Similarly, in the case of *Oneryildiz v Turkey*, of 2004, mentioned above and involving the explosion of a municipal rubbish tip which resulted in the loss of life of 39 people living in a contiguous irregular settlement, the ECHR in an expansive interpretation of the right to life (Article 2 of the ECoHR), considered “The positive obligation to take all appropriate steps to safeguard life...entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide *effective deterrence against threats* to the right to life.”³¹⁹ In relation to the obligation to guarantee an “effective judicial system” (Article 13) to deal with these violations, the Court sustained that Article 2 involved this duty particularly in the context of *dangerous activities*, “when lives have been lost as a result of events occurring under the responsibility of the public authorities, which are often the only entities to have *sufficient relevant knowledge to identify and establish the complex phenomena* that might have caused such incidents.” In relation to the right to protection of peaceful enjoyment of possessions, the Court pointed out that “the *causal link* established between the *gross negligence* attributable to the State and the *loss of human lives* also applies to the engulfment of the applicant’s house...the resulting infringement amounts not to ‘interference’ but to the breach of a positive obligation, since the State officials and authorities did not do everything within their power to protect the applicant’s proprietary interests”.³²⁰ Apart from the human rights explicitly under consideration by the Court, this case holds evident broader correlations to environmental rights, an important connection which the human security idea could contribute to emphasize openly, as part of a more reciprocal

³¹⁷ See UN Human Rights Committee, General Comment No. 29, *States of Emergency (article 4)*, CCPR/C/21/Rev.1/Add.11, 2001, para. 16.

³¹⁸ IACHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001 (Merits, Reparations and Costs), para. 154, referring to the obligations of States under article 1.1 of the American Convention on Human Rights. Emphasis added.

³¹⁹ See ECHR, *Oneryildiz v Turkey*, *op. cit.*, para. 89.

³²⁰ *Ibid.*, paras. 93 and 135.

dialogue between civil and political rights and ESC Rights.

In light of these cases, the possibility of the human security-human rights exchange is considered especially necessary in relation to ESC Rights, and to promote a more fruitful dialogue between these rights and civil and political rights, more so in the context of developing countries, or countries in a transition to democracy. These societies everyday still face, in different levels and degrees, problems of violations of civil and political rights, such as cases of torture, arbitrary detention, forced disappearance, restrictions to freedom of expression, and breaches of the right to due process of law or access to justice. Hence, the first and most urgent concern is usually the attention to these types of cases involving these civil and political rights, whereas the violations of ESC Rights have traditionally been treated through the right to non-discrimination or the right of equality,³²¹ occasionally through the focus on direct violations of ESC Rights and rarely through the view of violations of a positive duty to prevent.³²²

Indeed, in the arena of civil and political rights, the ‘right to security of person’, or ‘right to personal security’ (article 9, 1. of the ICCPR), has been broadly interpreted in relation to the *duty to prevent* a violation from taking place. This right was considered by the UN Human Rights Committee as applicable independently of the context of deprivation of liberty, in a case in which the State of Colombia had not taken proper measures to ensure the person’s right to security in spite of the death threats he had received. In the case of *Delgado Páez v Colombia*, the Committee affirmed that “State parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore *known threats* to the life of persons under their jurisdiction, just because...he or she is not arrested or otherwise detained. State parties are under an obligation to *take reasonable and appropriate measures to protect them*.”³²³ Thus, we may observe that the Committee concluded that the right to personal security encompassed a positive duty to prevent the violation, as part of the binding non-derogable content of this right.

Also relating to ESC Rights and regarding a more general institutional dimension within the UN structure, Erika de Wet has defended the incorporation of standards of ESC Rights into the actions of the Security Council through the examination of the Council’s actions to limit human rights norms when imposing economic sanctions under Chapter VII of the UN Charter, but distinguishing between *non-derogable and derogable human rights*. With respect to the latter, she supports limitation in accordance with a *proportionality principle* that protects the *core* of all the rights involved, including ESC Rights, while at the same time allows the Security Council the flexibility required by its unique role in the maintenance of international peace and security. In line with the position submitted in this thesis, the author argues in favour of a *broad and*

³²¹ See Krause, Catarina and Martin Scheinin, “The Right Not to be Discriminated Against: The Case of Social Security”, in Orlin, Theodore, S., Allan Rosas and Martin Scheinin (editors), *The Jurisprudence of Human Rights Law: A Comparative and Interpretive Approach*, *op. cit.*

³²² Interesting work however has been developed recently in this area; see for example Salomon, Margot E. and Ian Seiderman, “Human Rights Norms for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights”, *op. cit.* From an account from a political theory perspective, see Pogge, Thomas, “Severe Poverty as a Human Rights Violation”, in *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor*, Oxford University Press, Oxford, 2007. See also the most recent book covering a broad range of questions in this area: Langford, Malcolm, Wouter Vandenhoe, Martin Scheinin and Willem van Genugten (editors), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge University Press, 2013.

³²³ UN Human Rights Committee, Communication No. 195/1985, *Delgado Páez v. Colombia*, 12 July 1990, para. 5.5. Emphasis added.

interconnected interpretation of the core of rights, for example, of the right to life correlated to the right to health, following jurisprudence and interpretation of the relevant international human rights mechanisms.³²⁴ This type of interpretation of institutional implications transported to the analysis of individual cases of human rights violations would have proved especially useful in cases involving precisely the right to be protected from ill-treatment as related to the right to life and the right to health, for instance, that of *N. v. UK*, resolved by the ECHR in 2008, and dealt with in Chapter IV of the present text.

The lack of dialogue between all human rights –civil, political and ESC Rights- as well as the minimization of the implications of the relationships between their core content, has often proved detrimental for the protection of people’s human rights, especially the most vulnerable, as reviewed throughout this thesis. In this context, let us recall that violations of human rights may be caused through *actions* or through *omissions* of the State in breach of any of its general international obligations to *respect, protect and fulfil* human rights. This ‘trichotomy’ of human rights obligations was first proposed by Asbjorn Eide in his reports on the right to food under the ICESCR and then introduced in 1999 in General Comment No. 12, *Right to Adequate Food*, of the UN Committee on ESC Rights.³²⁵ However, some authors have reflected that this classification may result inadequate in facing the complexity of today’s human rights violations and the involvement of many non-State actors in activities affecting them, for example, development projects, privatization of services like water or electricity or severe cuts in welfare allowances, which could potentially violate the three duties of respecting, protecting and fulfilling human rights.³²⁶

In this scenario, it becomes useful to consider the concept of *continuum* of obligations (ranging from negative to positive),³²⁷ regarding all human rights, which may be analysed especially in the context of extreme poverty and human rights violations, as well as violations affecting certain sectors of society, such as women and girls. Given that the conceptual scheme of the triple typology to respecting, protecting and fulfilling “might be considered unworkable or an *oversimplification of the interconnected nature* of certain problems”,³²⁸ it is submitted that the human security notion may be deemed as a novel complement to provide criteria for filling in certain protection gaps that might arise and adapting this triple categorization to interdependent realities in the current globalized world.

In turn, this may contribute to provide a more realistic picture of the *widespread* situation of human (in)security in a given society, and the conditions of *vulnerability* to human rights’ violations that certain persons or groups find themselves in -a context which may become invisible if only dealing with *actual* violations of *individual* human rights that have *already* taken place.

³²⁴ See De Wet, Erika, “Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime”, in 14 *Leiden Journal of International Law*, 2001, pp. 277-300. Emphasis added.

³²⁵ See Eide, Asbjorn, UN Special Rapporteur on the Right to Food, *The Right to Food (Final Report)*, E/CN.4/Sub.2/1987/23, 1987, paras. 66-69; and UN Committee on ESC Rights, General Comment No. 12, *Right to Adequate Food*, E/C.12/1999/5, 1999, para. 15.

³²⁶ See Langford, Malcolm and Jeff A. King, “Committee on Economic, Social and Cultural Rights: Past, Present and Future”, *op. cit.*, pp. 484-486.

³²⁷ See Sepúlveda, Magdalena, *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, Anvers, Oxford, New York, 2003, Chapter V.

³²⁸ See Langford, Malcolm and Jeff A. King, *op. cit.*, p. 485.

It seems to be generally accepted though that “conflicts cannot be prevented or peace maintained in a world of wanton violations of human rights”.³²⁹ Now, if we are to accept the protection of *all human rights* –civil, political, economic, social and cultural- as the central element of *security concerns*, and combine it with the principle of interdependence of all human rights in an integrated approach, then it follows that at a minimum a ‘core content’ of all human rights would have to be taken into account in any understanding of security (in armed conflict or not), in connection with the identification of serious threats and risks that cause *structural vulnerabilities* in a context-specific approach (see graphic representation in II.3 below).

Under this view, the notion of human security would form part of a long line of legal and political instruments that have been used in modern law and discourse to forward social justice and equality. Consequently, apart from the conceptual validity of the connection, there seems to be a clear *strategic advantage* in exploring further the links in International Law between human security and human rights, specifically ESC Rights, as well as certain thematic topics as the human rights of women and girls, or the human rights of non-citizens, subsequently reviewed in Chapters III and IV, and viewing them as part of a shared ethical and legal project based on the common value of human dignity.

As was reviewed in the previous section, it may be observed that there is not enough substantiation at this moment to consider there is a full positive *legal* human right to human security in all its breadth and scope. Nonetheless, as it has been reviewed in this section, human security may be related to Public International Law, at least, in a bi-directional manner:

- i) in its articulation as an *enabling environment* allowing for the full realisation of all human rights, as a form of contemporary embodiment of Article 28 of the UDHR and related standards (see **Table 5** below); and
- ii) as an orienting notion for more protective, expansive and integrated interpretations of the core content of human rights and their non-derogable elements.

The concrete ways both potentials may unfold in practice, as well as the wider possibilities of the human security-human rights intersection in legal analysis, will be further discussed in this thesis, particularly in the thematic topics reviewed in Chapters III and IV of the text.

Human security’s more specific relationship to the scope of legal human rights has also been analysed at length by the Inter-American Commission of Human Rights; some of the implications of these links for the action of the African Commission for Human and Peoples’ Rights, have also been studied; and to a lesser extent the human security/human rights intersection has influenced the EU’s position on security, as will be explained in the following section on regional conceptions. More importantly, some aspects of human security, such as food security or the right to peace for women, are in fact included in the human rights legal framework at the African level.

In any case, it may not even be desirable for the whole concept of human security, flexible as it is, to become a human right with an autonomous legal foundation -at least in the current dominantly individualistic human rights architecture-, if we wish for human security to retain its power as a unifying, transforming idea, useful to understand in an integrated manner collective and interconnected realities such as the rights’-affecting structural vulnerabilities approached in this

³²⁹ Ramcharan, Bertrand, “Human rights and human security”, in *Disarmament Forum, Strengthening Disarmament and Security*, One 2004, p. 40. Emphasis added.

text. At the same time, it is argued in this thesis that human rights law may complement the human security proposal, and grant it needed specificity in scope and normative grounding, in order to translate it into State and other actors' concrete obligations.

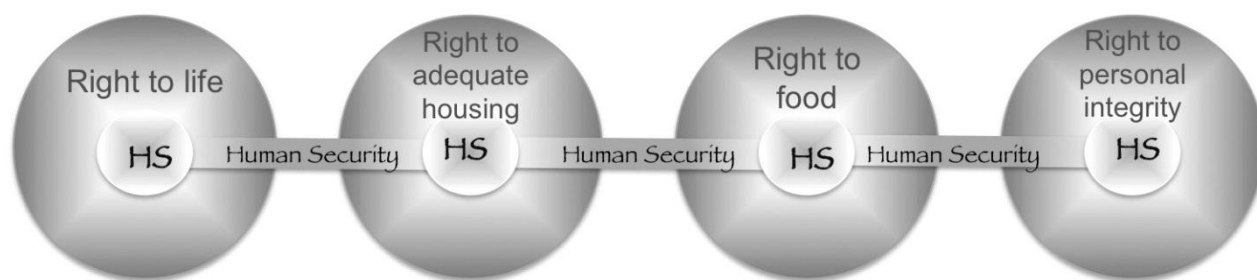
Regarding the first articulation of human security as an *enabling environment*, referred to above, it is submitted that human security may work in a dual way, or if one wishes, in a triple manner if we are to consider its ability as a *connecting* conception.

First, it is useful for providing criteria to identify risk situations and conditions of structural vulnerability, through what could be termed the *negative sense* of human security, that is, for assessing circumstances as lacking an adequate environment for general well-being and human rights realisation, and therefore activating duties of *prevention* and *protection* and/or *reparation*, as explained above.

It is also argued that human security has a potential to function as an *integrating bridge* between correlated ideas and norms, in this case, those that allow attention to interrelated risks to human rights that place persons in contexts of vulnerability.

Lastly, I propose that the result of looking at the connection between the *core content* of human rights and viewing them integrally may be considered in fact *human security*. Under this light, human security refers not only to the protection from severe threats and risks described in the working understanding, but in a *positive sense*, becomes also a *guarantee* at the collective level, a general condition which is necessary to allow the full enjoyment of all human rights by all persons. In this understanding, human security may act as the modern materialization of the right to an *enabling social and international environment* foreseen in Article 28 of the UDHR, and thus complement the individualist basis of human rights. This view of the human security/human rights symbiosis may be represented graphically with some exemplifying human rights as shown in **Table 5** below:

Table 5



If one wishes to, **Table 5** may be considered an ‘aerial’ view of the human security/human rights interaction illustrated in **Table 4** included at the end of section I.5.3 above. While Table 4 was an frontal picture of this intersection, here Table 5 represents a ‘dissection’ of how the symbiosis of human security and human rights would look like from within: human security understood as the ‘core content’ of every human right -congruent with the 2003 CHS definition of human security as the ‘vital core’ of human lives- and at the same time human security as the bridge between these minimum contents, in order to create altogether a facilitating environment for the fulfilment of all human rights in the spirit of Article 28 of the UDHR, as explained in the preceding paragraph.

Let us now take a look at the different ways in which regional bodies have understood that such a relationship can unfold in practice.

II.2.3 Links between human security and human rights: regional conceptions

As it has been noted, human security has been developed through different conceptualizations, regional bodies and institutional arrangements. Indeed, different regional and sub-regional organizations have considered human security within their goals and actions, including the Association of Southeast Asian Nations (ASEAN) and the League of Arab States (LAS).³³⁰ Much of the human security ideology has been promoted at the UN level by Japan under the broad umbrella of development issues, as explained above. Relevant research has also been carried out on “the Asian” idea of human security, and on what has at times been termed the East-West divide on the categorization of human security.³³¹

However, the regional settings that link human security to human rights more directly have been worked on at length in the Inter-American context, to a large extent within the African Union, and to some degree in the context of the European Union (EU). The fact that there is not such a development in the Asian context is understandable partly due to the lack of an institutional human rights’ system in place in the region (although there are on-going attempts to create one).³³² This

³³⁰ See Report of the UN Secretary General on Human Security, A/Res/64/701, 8 March 2010, para. 3.

³³¹ Acharya, Arabinda and Amitav Acharya, “Human Security in Asia: Conceptual Ambiguity and Common Understandings”, Centre for Peace and Development Studies, 2001, available at York University, Toronto /<http://www.yorku.ca/robarts/archives/chandigarth/S>; see also Amitav Acharya, “Human Security: East versus West”, in *International Journal* No. 3, p. 459.

³³² See UN OHCHR, “Towards the Establishment of an ASEAN Human Rights System”, available at <http://bangkok.ohchr.org/programme/asean/Default.aspx>. See also the recent press releases of the UN OHCHR

section will thus focus on the human security-human rights relationship as advanced at the regional level.

As a general stand, it can be observed that in the case of the European landscape, the EU has worked more specifically on human security and views it largely as a policy tool for strategic action which contains general principles of human rights, whereas in the scenario of the African Union and the Organization of American States and their sub-regional agreements, the focus is on a closer relationship of human security to the legal norms of specific human rights and to certain legally binding obligations.

The human security proposal has been presented as an influence on the evolution of the legal framework on Small Arms and Light Weapons (SALW),³³³ a debate that runs in parallel to the legal prohibitions regarding anti-personnel landmines achieved through the Ottawa Convention mentioned above, and that touches at the heart of human rights and humanitarian law concerns. As a person-centered approach seeking to confront threats to people and communities, in the years after its endorsement by the UNDP in 1994, the human security idea displayed its effects on the adoption of the 'EU Code of Conduct on Arms Exports' in 1998 and the Organization for Security and Cooperation in Europe (OSCE) 'Document on Small Arms and Light Weapons' in 2000.³³⁴ The adoption of these strategic documents was understood as the effect of a broader conception of security within the EU.

Human security ideas had an impact as well in the adoption of two binding treaties on this issue, one at the regional level of the Americas and one in the sub-regional West African sphere. In 1997, Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials was adopted following the human security spirit.³³⁵ Similarly, in the African framework, the 1998 Declaration on the Moratorium on the Importation, Exportation and Manufacture of Light Weapons by the Economic Community of West African States (ECOWAS), led to the adoption of the Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials, of 2006.³³⁶ This fully

discussing these initiatives: "UN rights chief welcomes focus on human rights and democracy, calls for review of ASEAN draft human rights declaration", 8 November 2012; "'ASEAN Human Rights Declaration should maintain international standards,' urges key UN expert group", 16 November 2012; and "Pillay encourages ASEAN to ensure Human Rights Declaration is implemented in accordance with international obligations", 19 November 2012; all available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx>

³³³ For a full account, see the analysis carried out by Barbara Von Tigerstrom in Chapter 6. of *Human Security and International Law*, *op. cit.*

³³⁴ European Union, 'EU Code of Conduct on Arms Exports' (8 June 1998), Council Doc 8675/2/98, Rev 2, 8.6.1998; OSCE, 'OSCE Document on Small Arms and Light Weapons', 24 November 2000, FSC.DOC/1/00.

³³⁵ Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, adopted 14 November 1997, entered into force 1 July 1998, OAS 24th Special Session, AG/doc.7 (XXIV-E/97), rev 1. In a subsequent resolution of 2005, the OAS General Assembly in urging Member States to accede to this Convention or take measures to implement it, emphasized the human security basis of such measures, also underlined in the 2003 *Declaration on Security in the Americas*, through recognizing that "the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials are a threat to *hemispheric security* and, when used by terrorists and criminals, undermine the rule of law, breed violence and, in some cases, impunity, exacerbate conflicts, and represent a *serious threat to human security*", AG/RES. 2094 (XXXV-O/05), Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, adopted at the fourth plenary session, held on June 7, 2005, preambular paragraph 7. Emphasis added.

³³⁶ ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials, adopted in Abuja, Nigeria on June 14, 2006, and entered into force on September 29, 2009, available at

binding treaty addresses several challenges to *human and state security* in the sub-region, including violence, cross-border drug and human trafficking, money laundering, smuggling and armed robberies, all linked to and sustained by SALW proliferation and related to several forms of harm to human rights.³³⁷

Let us then turn to the concrete ways in which human security has been understood and applied regionally in a more explicit reference to its relationship with human rights.

II.2.3.1 The European landscape

In the European landscape, most of the work related to human security has been done in the arena of the European Union (EU), rather than through the Council of Europe. However, the work of the Conference on the Security and Cooperation in Europe through the Helsinki Final Act of 1975, as explained above in the section on the right to peace, must be recalled as a document adopting a broad understanding of security, demonstrating a traceable origin of human security to at least part of European political thought and practice.

Indeed, subsequent work of the Organization for Security and Co-operation in Europe (OSCE) has specifically endorsed the human security vision and related it to the theme of violence against women as part of its commitment to human rights and gender equality.³³⁸ There are as well some human security initiatives related to ongoing efforts of the Council of Europe in the field of human rights, although the Council itself has not engaged explicitly in direct actions using the human security notion,³³⁹ and as referred above, the EU portrays a stronger human security influence.

Concerning more recent and explicit expressions within the EU, the reports *A Human Security Doctrine for Europe: The Barcelona Report of the Study Group on Europe's Security Capabilities*, of 2004,³⁴⁰ and more concretely *A European Way of Security: The Madrid Report of the Human Security Study Group comprising a Proposal and Background Report*, of 2007,³⁴¹ prepared by

www.ecosap.ecowas.int/en/ecosap/strategic_docs/convention/convention_small_arms.pdf. The Convention was adopted following a process involving the United Nations and local civil society, through the West Africa Action Network on Small Arms (WAANSA); see <http://www.unidir.org/pdf/articles/pdf-art2836.pdf>

³³⁷ See Darkwa, Linda, "The Challenge of Sub-Regional Security in West Africa. The Case of the 2006 ECOWAS Convention on Small Arms and Light Weapons", Discussion Paper 69, Nordiska Afrikainstitutet, Uppsala, 2011.

³³⁸ OSCE Ministerial Council Decision No. 15/05 Preventing and Combating Violence Against Women, MC.DEC/15/05, 6 December 2005, see preambular paras. 3, 4 and 8.

³³⁹ See for instance Human Security Focus of the European Training and Research Centre for Human Rights and Democracy (ETC) Graz and the Institute of International Law and International Relations of the University of Graz, available at [http://www.etc-graz.at/typo3/fileadmin/user_upload/ETC-Hauptseite/human_security/hs-perspectives/pdf/files/issue1_2012/16-](http://www.etc-graz.at/typo3/fileadmin/user_upload/ETC-Hauptseite/human_security/hs-perspectives/pdf/files/issue1_2012/16-HSP12_Human_Security_Focus_of_the_ETC_and_Institute_of_Int'l_Law_FINAL_.pdf)

[HSP12_Human_Security_Focus_of_the_ETC_and_Institute_of_Int'l_Law_FINAL_.pdf](http://www.etc-graz.at/typo3/fileadmin/user_upload/ETC-Hauptseite/human_security/hs-perspectives/pdf/files/issue1_2012/16-HSP12_Human_Security_Focus_of_the_ETC_and_Institute_of_Int'l_Law_FINAL_.pdf)

³⁴⁰ Albrecht, Ulrich and Chinkin, Christine and Dervis, Kemal and Dwan, Renata and Giddens, Anthony and Gnesotto, Nicole and Kaldor, Mary and Licht, Sonia and Pronk, Jan and Reinhardt, Klaus and Schmeder, Genevieve and Seifter, Pavel and Serra, Narcis, *A human security doctrine for Europe: the Barcelona Report of the Study Group on Europe's Security Capabilities. Study Group on Europe's Security Capabilities*, Barcelona, Spain, 15 September 2004, presented to EU High Representative for Common Foreign and Security Policy Javier Solana, available at <http://www.lse.ac.uk/Depts/global/Publications/HumanSecurityDoctrine.pdf>

³⁴¹ Albrecht, Ulrich and Chinkin, Christine and Collantes Celador, Gemma and Flechtner, Stefanie and Glasius, Marlies and Kaldor, Mary and Kiljunen, Kimmo and Klabbers, Jan and Kuper, Jenny and Licht, Sonia and Lotti, Flavio and Reinhardt, Klaus and Schmeder, Genevieve and Seifter, Pavel and Serra, Narcis and Weisskirchen, Gert, *A European way of security: the Madrid Report of the Human Security Study Group*, Human Security Study Group,

independent experts and presented to Javier Solana –at that time EU High Representative for Common Foreign and Security Policy- include a series of policy recommendations and orienting principles for the EU’s decisions and actions in the field of security.

The Barcelona Report recommends that the

European Union's security policy should be built on *human security* and not only on state security. Human security means individual freedom from basic insecurities...A *human security approach* for the European Union means that it should contribute to the protection of every individual human being and not focus only on the defense of the Union's borders, as was the security approach of nation-states.³⁴²

International law was considered in the Report to be construed to give the European Union “not only a right, but also a legal obligation to concern [itself] with human security worldwide”.³⁴³

In a similar line, the 2007 Madrid Report proposes a set of 6 principles to make human security operational, of which the first one is titled ‘The Primacy of Human Rights’ and sets forth that “Protection refers to both physical and material protection, that is economic and social as well as civil and political rights”.

Following this position, the EU is sceptical about the use of military force. In a view reliant more on ‘soft’, ‘moral’ or ‘normative’ power rather than force, the 2008 European Security Strategy calls for preventive efforts -including the spreading of democratic ideals, human rights, and reduction of poverty- as means to peace and security.³⁴⁴ This strategy of the EU has been called ‘presumptive pacifism’.³⁴⁵

The European Commission describes ‘the distinctive European approach’ to international peace and security, specifically envisioned as a ‘human security’ one, in the following way:

[The EU has] worked to build *human security*, by reducing poverty and inequality, promoting good governance and human rights, assisting development, and addressing the root causes of conflict and insecurity. The EU remains the biggest donor to countries in need. Long-term engagement is required for lasting stabilisation...These achievements are the results of a distinctive European approach to foreign and security policy.³⁴⁶

The core of the European Security Strategy is that military force should only be used as a last

Madrid, Spain, 2007, presented to EU High Representative for Common Foreign and Security Policy Javier Solana, available at www.lse.ac.uk/depts/global/studygroup/studygroup.htm

³⁴² *Ibidem*, p. 9.

³⁴³ *Ibidem*, p. 10.

³⁴⁴ European Council, *Report on the Implementation of the European Security Strategy*, S407/08, December 11, 2008, pp. 4, 9, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf; European Council, *A Secure Europe in a Better World: European Security Strategy*, December 12, 2003, pp. 6, 10, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>. As has been described, an expression of this strategy is the EU's policy on small arms, materialized for example in the *Everything But Arms Initiative*, which grants duty-free and quota-free access to all exports, excluding arms and munitions, from the least developed countries; see Council Regulation 416/2001, O.J. (L 60) 43 (EC), 2001.

³⁴⁵ Bradford, Anu and Eric A. Posner, “Universal Exceptionalism in International Law”, in 52 *Harvard International Law Journal* 1, Winter 2011, p. 18.

³⁴⁶ European Council, *Report on the Implementation of the European Security Strategy*, *op.cit.*, p. 2. Emphasis added.

resort after all diplomatic means have been exhausted. The EU also rejects the preventive war doctrine, and insists that Security Council authorization must be secured before force is deployed, although in practice this has at times resulted differently.³⁴⁷

Indeed, the EU has presented itself as a global actor capable of influencing international discussion and law-making in favour of a set of values that have shaped its identity, including its legal expressions in articles 2 and 3 of the Treaty on European Union (TEU). This impact is made more tangible through the external promotion of human rights standards by the EU and through the use of a notion of *human security*, partly reflected in the European Security Strategy, as mentioned, as well as in the EU's negotiating position regarding different international treaties. The current debate seems to have taken a new face in what has been termed by Mary Martin and Taylor Owen as "the second generation of human security", materialized through the EU experience.³⁴⁸ Certainly, the EU has played an important role in the promotion of normative developments on various human security issues, like the prohibition of landmines and cluster bombs and the negotiation process on small arms and light weapons. For Mary Kaldor, human security may serve as the only possible framework to adequately address contemporary risks to human beings and may add renewed value specifically to the EU's human rights-oriented practice in serving "as a 'symbolic signpost' in the development of the EU's strategic culture, reconciling the Union's normative and value-driven tradition with a quest for effectiveness".³⁴⁹ She has also argued that although the EU has not formally adopted the human security framework for its external relations, many of its policy priorities and principles, including in crisis management, civil-military cooperation and conflict management, have been framed in the language of human security.³⁵⁰

The respect for human rights positioned at the center of human security, also embodies values promoted by the EU as essential features of its international activity, as laid down in article 21 of the TEU. The recent adoption of the EU Strategic Framework on Human Rights and Democracy on June 25, 2012 and the appointment of an EU Special Representative for Human Rights, Mr. Stavros Lambrinidis, acting as of September 1, 2012, evidence the attempt to place human rights, as EU High Representative for Foreign Affairs Catherine Ashton emphasized, as the "silver

³⁴⁷ See European Council, *A Secure Europe in a Better World: European Security Strategy*, *op. cit.*, pp. 1 and 9 (recognizing the United States' "dominant position as a military actor" but stating that "no single country is able to tackle today's complex problems on its own" and that "the United Nations Security Council has the primary responsibility for the maintenance of international peace and security"). However, Bradford and Posner note that "Despite the pacifist rhetoric, individual EU member states have engaged in military operations in recent years -for example, in the war in Afghanistan, which was authorized by the Security Council. EU members have even used military force without international legal justification. The U.S.-led invasion of Iraq in 2003 violated international law because it did not serve any country's defensive purposes, and it was not authorized by the Security Council", "Universal Exceptionalism in International Law", *op. cit.*, p. 20.

³⁴⁸ Martin, Mary and Owen, Taylor, "The second generation of human security: lessons from the UN and EU experience", in *International Affairs*, No. 86: 1, 2010, pp. 211-224.

³⁴⁹ Kaldor, Mary, Mary Martin and Sabine Selchow, "Human Security: A European Strategic Narrative", in *International Policy Analysis*, Friedrich Ebert Stiftung, February 2008, p. 4; see also p. 2. See as well Liotta, P.H Lanham, *The uncertain certainty: human security, environmental change, and the future Euro-Mediterranean*, Md., Oxford, Lexington, 2003.

³⁵⁰ See generally Kaldor, Mary, *Human Security*, Polity Press, Cambridge, 2007; and Martin, Mary, Mary Kaldor and Narcís Serra (editors), *National, European and human security: from co-existence to convergence*, Routledge, New York, 2012. See also Benedek, Wolfgang, "Mainstreaming human security in United Nations and European Union peace and crisis management operations: policies and practice", in Benedek, Wolfgang, Matthias C. Kettmann and Markus Möstl (editors), *Mainstreaming human security in peace operations and crisis management : policies, problems, potentials*, Routledge, Abingdon, Oxon, New York, 2011.

thread” that runs through everything the EU does in external relations.³⁵¹

Still, at the time of writing, especially in the current scenario of economic crisis and credibility challenges for the EU, it is not exactly clear how the human security calling fits into the puzzle of the Union’s actions, not only towards other countries and regions, but also: a) in the international human rights’ treaties it is a part of (for example, the UN Convention on the Rights of Persons with Disabilities, the first human rights treaty to which the EU as such is a Party); b) in international human rights forums in general, e.g., its positions and voting stands in the UN Human Rights Council, considering the EU’s legal commitment to advance the principles of International Law and the current momentum for human rights created with the adoption of the European Charter of Fundamental Rights, binding through the ratification of the Lisbon Treaty, and the prospect of accession of the EU to the ECoHR; and c) in the coherence between the EU’s foreign policy on human rights and the EU’s legal framework on migration, asylum-seekers and refugees, as well as the impact of such common normative foundation on the law and policy of individual Member States and the living conditions of undocumented migrants and other non-citizens in EU Member States, a point that will be analysed further in Chapter III of this text.

II.2.3.2 The African Union

The African regional organization, formerly the Organization of African Unity which in 2000 became the African Union (AU), allows through Article 4,h) of its Constitutive Act, for intervention of the Union in a Member State in the case of grave circumstances, namely, genocide, war crimes and crimes against humanity, without any specific requirement in such instrument that compels for previous UN Security Council approval;³⁵² a provision that would resemble an R2P type of approach, as described above in Chapter I, and that has been much discussed under that framework.³⁵³ More directly related to our topic, Article 4,j) of the AU Constitutive Act sets forth the right of Member States to request intervention from the Union in order “to restore peace and security”, a provision which has been related to human security because of its bearing on peace-keeping operations by the AU Peace and Security Council that have contributed to meet various human security challenges, including some related to food security for women in Burundi, Darfur (Sudan), and Somalia, as foreseen in the 2003 Maputo Protocol of the Rights of Women in Africa,³⁵⁴ reviewed in Chapter III below.

The AU has included explicit mentions of human security in other instruments. In its Non-Aggression and Common Defence Pact of 2005, it specifically incorporated *human security* as one of its guiding lines of action, as “the security of the individual in terms of satisfaction of his/her

³⁵¹ See Council of the European Union, “EU adopts Strategic Framework on Human Rights and Democracy”, 11737/12, Presse 285, Luxembourg, 25 June 2012.

³⁵² Constitutive Act of the African Union, done at Lomé, Togo, 11 of July, 2000, available at http://www.au2002.gov.za/docs/key_oau/au_act.htm

³⁵³ Tehindrazanarivelo, Djaboca L., “The African Union’s relationship with the United Nations in the maintenance of peace and security”, in Yusuf, Abdulqawi A. and Fatsah Ouguerouz (editors), *The African Union legal and institutional framework: a manual on the pan-African organization*, Martinus Nijhoff Publishers, Leiden, Boston, 2012.

³⁵⁴ Mubiala, Mutoy, “Peacekeeping operations: the examples of Burundi and Sudan”, in Yusuf, *op. cit.* Similar views were expressed by Omorogbe, Eki Y., “The Impact of the AU on Women in Armed Conflict in Africa”, Conference delivered at the 5th Annual Conference of the European Society of International Law, in Valencia, Spain, 13 September 2012, personal notes taken.

basic needs. It also includes the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and *respect for human rights*, good governance and the guarantee for each individual of opportunities and choices for his/her full development”.³⁵⁵ At the same time, human security has been specifically referred to and endorsed in the sub-regional agreements of ECOWAS.³⁵⁶

In its concrete intersection with human rights, explicit concern for the human security and human rights of certain groups, for example, migrants and refugees, rendered vulnerable and subject to racism and xenophobia –in line with one of the thematic cores of this thesis- had already been expressed and later confirmed in African Union policy documents.³⁵⁷

African civil society has also done its part in contributing to the human security-human rights debate by clarifying how human security can prevail in a shared social context:

Human security requires, at a minimum, secure access to the essential requirements for an adequate human life. These essential requirements are, in turn, specified by a conception of human rights.³⁵⁸

One of the few studies using a similar methodology to this thesis and exploring the concrete links between human security and human rights standards and institutions has actually been suggested in the African context:

In Africa, where multiple conditions pervasively threaten *human security*, it is necessary that all available institutional, political and legal mechanisms be employed to address these threats and to contribute to providing human security to all individuals and communities. Indubitably, the *African human rights system* is one such mechanism that could contribute greatly to the protection and promotion of human security on the continent. In this regard, the role of *African human rights bodies* in the promotion and protection of human and peoples’ rights and their contribution to *human security* need to be investigated.³⁵⁹

³⁵⁵ Non-Aggression and Common Defence Pact, adopted on 31 January, 2005, Article 1,k).

³⁵⁶ Terwase Sampson, Isaac, “The Responsibility to Protect and ECOWAS Mechanisms on Peace and Security: Assessing their Convergence and Divergence on Intervention”, in *Journal of Conflict and Security Law*, No. 16 (3), Oxford University Press 2011, 1 November 2011, pp. 507 and following.

³⁵⁷ The AU’s *Draft Strategic Framework for a Policy on Migration in Africa*, of 2003, in analyzing undocumented migration facilitated by human smuggling, stressed that “migrants who resort to smugglers often find themselves in positions of *extreme vulnerability*” and thus “government responses and policies to smuggling should at all stages take account of migrants’ human rights, and to the extent possible, seek to respond to the motivations behind this form of irregular migration” (emphasis added). It also indicated as one of its recommended actions to Member States to “Safeguard the *human security* needs of refugees (physical, material, legal and health), especially in the context of refugee camps and with particular attention to the needs of vulnerable groups (women, children, disabled, and the elderly), while at the same time ensuring that refugees are aware of national laws and regulations and their obligations to abide by these” (emphasis added); pp. 11 and 16. This draft framework was confirmed in the same terms in the final version of the *Migration Policy Framework for Africa*, EX.CL/276 (IX), adopted in the Ninth Ordinary Session of the Executive Council of the AU, Banjul, The Gambia, 25–29 June 2006, pp. 15 and 20.

³⁵⁸ Cherubin-Doumbia, Giliane, “African Commitments to Human Rights. A review of eight NEPAD countries”, A *Monograph for the African Human Security Initiative*, www.africanreview.org, p. 4, available at <http://www.issafrica.org/pubs/Other/ahsi/ChrubinMono/Contents.html>

³⁵⁹ Dersso, Solomon A. (editor), *Promotion of Human Security in Africa. The Role of African Human Rights Institutions*, ISS Monograph Series, No. 145, June 2008, p. v. Emphasis added. See the publication for a deeper analysis of the human security potentials for human rights institutions in Africa.

Moreover, African legally binding instruments in the field of human rights have specifically picked up human security concerns relating to women such as the right to peace or the right to food security, as will be described in Chapter III of this thesis.

Going one step further, and based not only on the common denominators of the human rights/human security symbiosis, but also on the African Commission's legal basis and institutional practice, it has been suggested that the normative and textual promise (largely contained within the African Charter) of the African Commission shall, through the effective discharge of its broad human rights mandate, serve as an important *collective human security* resource.³⁶⁰

II.2.3.3 The Americas and its human rights' system

A set of strong links of human security to human rights, and their legal relevance, has also been drawn within the Inter-American context. As it has already been described, one of human security's main concerns is intra-State over inter-State violent conflict; in this respect, crime (common, organized and/or transnational) has become one of the most pressing security challenges for States today. In line with this, the Inter-American Commission of Human Rights (IACoHR), one of the six principal bodies of the Organization of American States (OAS), in its 2009 report *Citizen Security and Human Rights*, (and surprisingly not referred to in the 2010 Report of the UN Secretary-General on Human Security), sheds an interesting light on this debate, and thereby is reviewed under a more detailed light. The Report provides the following definition:

Citizen security is one of the dimensions of *human security* and therefore of human development and is linked to the interrelated presence of multiple actors, conditions and factors. Among these factors are:...the relevance of economic, social and cultural rights; and the international and regional level. Citizen security is undermined whenever States fail to protect their population from crime and social violence, signaling a breakdown in the relationship between those governing and the governed...

The countries of the region have some of the highest rates of crime and violence in the world and their young population has been the most affected, both as victims and as perpetrators. For the first time in decades the population of Latin America lists crime as a major concern, even greater than unemployment...

...[C]itizen security must be regarded as a public policy, understood as the guidelines or courses of action established by the authorities to achieve an objective and that serve to create or transform the conditions in which individuals or groups in society carry out their activities. A public policy cannot be fully understood without establishing a nexus to *human rights*.³⁶¹

³⁶⁰ Chinedu Okafor, Obiora, "The African Commission on Human and Peoples' Rights as a Collective Human Security Resource: Promise, Performance, and Prospects", in *Protecting Human Security in Africa*, edited by Ademola Abass, Oxford University Press, 2010, pp. 313-340, taken from OXFORD SCHOLARSHIP ONLINE (www.oxfordscholarship.com).

³⁶¹ Inter-American Commission of Human Rights, Organization of American States, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, Doc. 57, 31 December 2009, paras. 2-4 of Executive Summary.

The Report also explains that the right to security from crime or interpersonal or social violence is not expressly protected under the international system of human rights law, but that the right to such protection can be inferred from the obligation of the State to guarantee the security of the individual as set forth in the articles which refer to the *right to personal security*, as will be explained further on. However, “the Commission considers that the current basis of the obligations incumbent upon States is a *normative core* demanding the *protection of rights particularly vulnerable* to criminal or violent acts that citizen security policies are intended to prevent and control”. This group of rights includes mainly the right to life, the right to physical integrity, the right to freedom, the right to due process and the right to the use and enjoyment of one’s property”.³⁶²

Additionally, it clarifies that the expression ‘citizen security’ emerged, for the most part, as a concept in Latin America, as governments made the transition to democracy, as a way to distinguish the concept of security under a democracy from the notion of security under the earlier authoritarian regimes. In the latter case, the concept of security was associated with concepts like “national security”, “internal security” or “public security”, all of which refer specifically to the security of the State. Under democratic regimes, the concept of security against the threat of crime or violence is associated with “citizen security” and is used to refer to the paramount security of individuals and social groups.³⁶³

The report also examines the member states’ positive and negative obligations *vis-à-vis* their policies on citizen security and looks at how the principles of human rights are put into practice in the measures the member states take to deal with the problem of violence and crime in the region. In this context, the Commission presents the main elements that, in its view, characterize public policy on citizen security in light of international standards on human rights. Afterwards, an examination is made regarding each individual human right directly at stake in policies on citizen security.

Therefore, it may be seen how at the regional level, the notion of human security has also been used as a reference point for the development not only of people-centered approaches to security, but also of legally binding obligations and public policies on security with a human rights-based approach.

Actually, this concept of citizen security provided by the Inter-American Commission comes from a trend of people-centered and broad ideas of security, such as that of *democratic security*, developed mainly in the last twenty years in the region of the Americas, and in a more extended manner, in the Latin American context.³⁶⁴

³⁶² *Ibid.*, para. 18.

³⁶³ *Ibid.*, para. 21. However, it is worth noting that the Report explains in the same paragraph that “the concept of ‘public security’ is still widely used in the United States and Canada to also refer to the security of the individuals and groups who make up society. By contrast, as noted above, in Latin America the very same expression, ‘public security’, refers to a different concept altogether, alluding to the security built by the State or, on occasions, the security of the State”.

³⁶⁴ For an account of the development of “the multidimensional concept of security” that considers “the human dimensions of security” and departs from the traditional State-focused conception, in the Americas in general and in the Latin American scenario, see the Interventions of the delegations of Argentina and Uruguay, under Issue 167 of the agenda: “South-American Zone of Peace and Cooperation”, 57 period of sessions of the UN General Assembly, 11 and 14 November 2002, respectively; and the Guidelines for the Policy of External Common Andean Security,

This trend can also be seen in what has been termed as *hemispheric security* adopted by the *Declaration on Security in the Americas of 2003*, adopted in Mexico City, which takes up the concept of human security and contains its multidimensional focus and core elements. Noting the profound changes that had occurred in the world and in the Americas since 1945, OAS Member States reaffirmed “that the basis and *purpose of security is the protection of human beings*. Security is strengthened when we deepen its human dimension. Conditions for *human security* are improved through full respect for people’s dignity, *human rights*, and fundamental freedoms, as well as the promotion of social and economic development, social inclusion, and education and the fight against poverty, disease and hunger”. Furthermore, “The security threats, concerns, and other challenges in the hemispheric context are of diverse nature and multidimensional scope, and the traditional concept and approach must be expanded to encompass new and non-traditional threats, which include political, economic, social, health and environmental aspects”.³⁶⁵ Notably, even in the aftermath of 9/11, the Declaration was adopted in 2003 by all OAS Member States, including the United States and Canada.

Actually, this Declaration stems partly from the dissatisfaction by some countries of the region with the Inter-American Treaty on Reciprocal Assistance, the “Rio Treaty” of 1947,³⁶⁶ a treaty referred to collective security in the Americas following the Inter-American tradition of repudiation of war as an instrument of national or international policy and thus establishing the obligation to resort to peaceful settlement of disputes.³⁶⁷ At the same time, the Rio Treaty, concerned with the risks to security in the Western hemisphere, on the basis of the ‘principle of continental solidarity’ provides for the duty of Member States’ cooperation, including military assistance as part of the right to self defense set forth in article 51 of the UN Charter, in the case of an ‘armed attack’ against one or more of the American States and upon their request of such assistance (article 3). The Rio Treaty is the first regional arrangement of its nature prepared within the provisions of the UN Charter, after which the Brussels Alliances and the North Atlantic Pact (which gave way to NATO) were largely patterned.³⁶⁸

However, by 2001, the Rio Treaty was considered by some States of the Americas to be obsolete and reflecting a Cold-War logic of security no longer applicable to the twenty-first century context. Instead, it was considered that countries should adopt a multi-dimensional and person-centered stance on security, which in modern-day light of the Inter-American reality, is linked much more to poverty, social inequality, drug trafficking and organized crime than to threats of a foreign or military nature. Thus, Mexico announced in the Permanent Council of the OAS on September 7, 2011 (strikingly two days before 9/11) its intention to withdraw from the Rio

Decision 587, adopted at the 13th Ordinary Meeting of the Andean Council of Ministers of Foreign Affairs (integrated by Bolivia, Colombia, Ecuador and Peru) on 10 July 2004.

³⁶⁵ *Declaration on Security in the Americas*, OAS/Ser.K/XXXVIII, CES/DEC. 1/03 rev.1., adopted in Mexico City on 28 October 2003, O.P. 4, e) and O.P. 2.

³⁶⁶ *Inter-American Treaty on Reciprocal Assistance*, adopted at the Conference for the Maintenance of Continental Peace and Security of the OAS, in Rio de Janeiro, Brasil, on 2 September, 1947.

³⁶⁷ In this sense, see García-Mora, Manuel R., “The Law of the Inter-American Treaty of Reciprocal Assistance”, in *Fordham Law Review*, Volume 20, Issue 1, 1951, at p. 5; available at <http://ir.lawnet.fordham.edu/flr/vol20/iss1/1>. The article traces the Inter-American ‘principle’ of repudiation of war as a means for international relations back to preceding documents of the 1928 Kellogg-Briand Pact, through to the 1940 Habana resolution, the 1945 Chapultepec Act, the 1948 American Treaty on Pacific Settlement (Pact of Bogota) and the 1948 Charter of the Organization of American States (Bogota Charter). See this article as well for a fascinating history of the drafting of the Rio Treaty and its implementation after the first years of adoption.

³⁶⁸ García Mora, *Ibid.*, p. 5.

Treaty³⁶⁹ and did so formally the following year³⁷⁰ –possibly anticipating the US War in Iraq despite the fact that Brasil had invoked the Rio Treaty as a basis to assist the US after the 2001 terrorist attacks (and successfully supported by the resulting OAS resolutions³⁷¹), although most Latin American countries did not participate actively in the “War on Terror”.

In parallel to its withdrawal from the Rio Treaty, Mexico proposed and hosted in 2003 the OAS meeting which gave way to the *Declaration on Security in the Americas* endorsing the human security vision, as mentioned above. Notably, in June 2012, at the forty-second regular session of the OAS General Assembly, some of the countries of the Bolivarian Alliance for the Peoples of Our Americas (ALBA, after its name in Spanish) –Venezuela, Bolivia, Ecuador and Nicaragua– announced their intention of withdrawing from the Rio Treaty as well, which partially reflects the shift in the hemispheric security paradigm, although at the same time the departure responds first, to an anti-imperialist position derived from ALBA’s perception of the Rio Treaty as a US led initiative, and secondly, to the regional political divisions regarding the Inter-American human rights system.³⁷²

At the level of so-called ‘soft-law’ instruments, however, in the same session of 2012 and following the human security conception, the OAS General Assembly adopted the Declaration of Cochabamba on “Food Security with Sovereignty in the Americas”³⁷³ and the resolution “Excessive commodity price volatility and its consequences for food security and sustainable development in the Americas”,³⁷⁴ which both endorse a broad idea of security as encompassing the human right to food.

Tracing further back the Inter-American experience, the 1995 Framework Treaty on Democratic Security in Central America (adopted a year after the UNDP Report that fully articulated the idea of human security), had affirmed that the objective of the Central American Democratic Security

³⁶⁹ “President informs OAS Mexico likely to withdraw from Reciprocal Assistance Treaty”, September 7, 2001, available at <http://fox.presidencia.gob.mx/actividades/?contenido=1812>

³⁷⁰ <http://www.oas.org/juridico/english/signs/b-29.html>

³⁷¹ Consejo Permanente, OEA/Ser.GCP/ACTA 1293/01, 19 septiembre 2001 (available in Spanish). Mexico did not cosponsor the Brazilian resolution.

³⁷² OAS 42nd regular session of the General Assembly, held in Cochabamba, Bolivia, June 3-5, 2012, resulting documents available at <http://www.oas.org/en/42ga/>. This announcement was made within the background context of the attacks by these same countries against the Inter-American Commission of Human Rights for considering it biased in favor of the US and Canada, who are in turn perceived to have a ‘superiority complex’ reflected by not having acceded to the American Convention on Human Rights (Pact of San José) since its adoption in 1969 and not submitting themselves to the jurisdiction of the Inter-American Court of Human Rights. These assaults against the regional human rights system, however, were received with great concern by various sectors of the human rights communities in the continent (Human Rights Watch in the Americas, and several academics and activists) who consider the arguments of the four ALBA countries as extreme and ultimately as a pretext to remove themselves from the oversight of the Commission and the Court regarding their own actions. In any case, the intention of the four ALBA States to withdraw from the Rio Treaty was presumably a reaction towards the US denial to fully cooperate with the human rights system; see “OAS rights body facing criticisms, dissolution”, *IASW*, Friday, June 8th, 2012; and “ALBA attacks justice, human rights”, *IASW*, Tuesday, June 12th, 2012; both available at <http://interamericansecuritywatch.com/category/nicaragua/>, and “Whither the OAS?”, by CLALS Staff, June 11th, 2012, available at <http://bender.library.american.edu:8083/aula/?m=201206;http://onceuponatimeinthewest1.wordpress.com/2012/06/07/latin-america-file-alba-states-withdraw-from-rio-treaty-during-oas-summit-in-bolivia-protest-us-role-in-oas-commission-support-for-uk-sovereignty-over-falklands-founded-in-1947-inter-american-tre/>

³⁷³ Declaration of Cochabamba on “Food Security with Sovereignty in the Americas”, AG/DEC. 69 (XLII-O/12), adopted at the fourth plenary session, held on June 5, 2012.

³⁷⁴ AG/RES. 2757 (XLII-O/12), agreed at the fourth plenary session, held on June 5, 2012.

Model is to respect, promote and safeguard all human rights, and with this objective in mind, it regulated a series of duties of the Parties with relation to external armed aggressions, incorporating partly the traditional view of State-security but changing the focus to a people-centered justification.

The Treaty, which the six dominantly Spanish-speaking Central American countries are party to (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama –excluding Belize), specifically points out in article 10, a) and d) that “*Democratic security* is absolute and indivisible. Resolution of *human security* problems in the region shall therefore reflect a comprehensive and interrelated vision of all aspects of sustainable development in Central America, in its political, economic, social, cultural and ecological aspects” and affirms “the belief that poverty and extreme poverty are *threats to the security of their peoples* and to the democratic stability of Central American societies”.³⁷⁵

More importantly, the Framework Treaty expressly contains positive obligations of the State that refer to some of the defining elements of the notion of human security, when it lays down that the Security Commission (composed of the Deputy Ministers for Foreign Affairs and Deputy Ministers in the areas of defense and public security of the Central American States) has the responsibility to “Strengthen operational coordination mechanisms in the areas of defense, public security and humanitarian cooperation to deal with emergencies, threats and natural disasters” (article 52,e.).

Against this historical background, as of today the ‘multidimensional conception of security’, encompassing the broad understanding of human security, is supported by an institutional structure through the Secretariat for Multidimensional Security, one of the six Secretariats of the OAS, created to “coordinate cooperation among the Member States to fight threats to national and *citizen security*, and to work to mitigate the harmful effects of those threats on the health and well-being of citizens and societies in the Member States and to *prevent* the abuse of psychotropic substances, crime, and violence; capacity-building; legal and legislative assistance; and the *promotion of health and education*”.³⁷⁶

Based on this Secretariat, a series of bodies and mechanisms have been created to promote the application of such notion, including through promoting the implementation of the treaties related to hemispheric security. Among these legal instruments, we may find those containing more traditional security concerns such as the Rio Treaty, as well as others more related to the notion of human security. Such is the case of the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, the ‘Tlatelolco Treaty’,³⁷⁷ adopted in 1967 in the eve of the Cuban missiles crisis, as an instrument that constituted this region as the first one in the world free of nuclear weapons -reason for which its main promoter, the Mexican Alfonso García Robles, won the Nobel Peace Prize in 1982. Human security concerns closer to its contemporary articulation are clearly reflected in the most recent treaties under the competence of the Secretariat, such as the

³⁷⁵ Framework Treaty on Democratic Security in Central America, adopted on 15 December 1995 by the States of Central America: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, and entered into force 26 December 1997.

³⁷⁶ <http://www.oas.org/en/about/secretariats.asp>

³⁷⁷ Signed in Mexico City on 14 February, 1967, available at <http://opanal.org/opanal/Tlatelolco/Tlatelolco-i.htm>

1991 Inter-American Convention to Facilitate Disaster Assistance,³⁷⁸ the 1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other related Materials (CIFTA, drafted explicitly influenced by the human security agenda), or the 1999 Inter-American Convention on Transparency in Conventional Weapons Acquisitions. Sub-regional treaties are also contemplated, like the 1995 Framework Convention on Democratic Security in Central America, explicitly containing duties regarding human security as mentioned above; as well as universal treaties such as the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, the ‘Ottawa Convention’, a victory for human security advocates, as explained above.³⁷⁹

In this sense, looking at the actors and the content involved in the reviewed documents, it could be concluded that the Inter-American expressions of human security have actually been more Latin American in character than wholly continental. As a result in part of democratic consolidation in Latin American countries in the 1990s-early 2000s and Latin American interests in limiting the influence of US hard-core national security ideas governing its regional policy, a conception of human security emerged primarily among Latin-American States (mainly through foreign policy, while admittedly not always coherent with their domestic security norms and policies). This stemmed from national and sub-regional arrangements that detected local problems and dealt with them through the construction of a human security framework as adapted regionally, more than as a global concept applied unquestioningly in a top-bottom fashion at the national, regional or local level.³⁸⁰ At the same time, Canada stands out in the continental context as one of the strongest global promoters of the human security conception -especially back in its initial and developing stages-, thereby leaving the US as the main residual advocate among the States of the Americas of a traditional understanding of national and military security.

At the same time, these changes have been reviewed critically by human rights scholars. In line with the proposal of this thesis to utilize the human security-human rights framework as a useful tool in addressing structural problems, it has been highlighted that the Inter-American system should be reconfigured to respond to human rights needs in the region in the most efficient manner possible. As Ariel Dulitzky notes, the Inter-American Commission of Human Rights has indicated that *citizen security*, social inequality, access to justice, and democratic consolidation are areas which require ongoing attention for their relation to human rights. It underlines the structural weaknesses of democratic institutions, as well as the gaps and contrasts present within the most socio-economically unequal region. From this perspective, it is necessary to strengthen the ability of the Inter-American system not only in procedural terms, but mostly in the substantive area, to influence the general orientation, formulation, implementation, evaluation, and supervision of *public policies* that overcome the weaknesses and structural problems of the region. Indeed,

³⁷⁸ Adopted at Santiago, Chile, on 7 June, 1991, at the twenty-first regular session of the General Assembly of the OAS, entered into force on 16 October, 1996.

³⁷⁹ See <http://www.oas.org/en/sms/conventions.asp>

³⁸⁰ In this respect, see Sorj, Bernardo, “Security, Human Security and Latin America”, in *Sur. International Journal on Human Rights*, No. 3, Year 2, 2005, p. 47. More generally, on the influence of Latin America on International Law and the idea of a Latin American international law, see Álvarez, Alejandro, “Latin America and International law”, *American Journal of International Law*, vol. 3, 1909, pp. 269-353. For a publication of a hundred years later, see Obregón, Liliana, “Latin American International Law,” in Armstrong, J. D. and Jutta Brunée (editors), *Routledge Handbook of International Law*, Routledge International Handbooks, Routledge, London, New York, 2009; and Rodríguez Garavito, César (editor), *El Derecho En América Latina: Un Mapa para el Pensamiento Jurídico del Siglo Xxi*, Siglo XXI Editores, Bogotá, 2011.

Dulitzky signals that it is erroneous to overemphasize the Inter-American *individual* petition system at the expense of other available tools presuming that *structural human rights problems* in the region can be resolved through legal and judicial responses. As the author recalls, the system has worked against States during periods of dictatorship, and often in spite of States during periods of democratic transition. It is deemed that now, though, it is essential for the system to work with States when possible. The current proposal to rethink the Inter-American system maintains that the individual petition *system* should continue playing an important role. However, it should neither be the sole focus nor use the majority of the Inter-American Commission's time and resources. In this respect, new examples of more visionary collaboration between the States and the IACoHR are developing, demonstrating that it is possible for the Inter-American system to be an ally in increasing the *effective protection* of fundamental rights and liberties in the region, while at the same time finding *justice* in numerous *individual cases*.³⁸¹

Thus, the whole of the Inter-American experience constitutes an example of how the 'building blocks' of the notion of human security have been expressed in international legal instruments, and have gained leeway at the regional level, in a faster speed, so to speak, than the experience at the UN level.³⁸²

II.2.4 ESC Rights, human insecurity and vulnerability to poverty

"Poverty anywhere constitutes a danger everywhere"
- Philadelphia Declaration of the ILO, 1944

Poverty is not only an issue of ESC Rights. Vulnerability to fall into a situation of poverty and the vulnerability itself that poverty entails for those who suffer it, in particular extreme poverty and chronic poverty, touch upon the whole range of human rights –civil, political, economic, social and cultural. As the recently issued UN Guiding Principles on Extreme Poverty and Human Rights emphasize, "Not only is extreme poverty characterized by *multiple reinforcing violations* of civil, political, economic, social and cultural rights, but persons living in poverty generally experience *regular denials of their dignity and equality*".³⁸³

Reflections on socio-economic risks and vulnerabilities from the human security perspective can thus feed into and complement on-going discussions on the legal obligation to alleviate world poverty as a pressing human rights and global justice concern.³⁸⁴ As elaborated further in the

³⁸¹ Dulitzky, Ariel, "The Inter-American Human Rights System Fifty Years Later: Time for Changes", in *Quebec Journal of International Law* (Special Edition), 2011, pp. 142-143 and 163-164. Emphasis added.

³⁸² In this context, the importance of the direction the discussion on human security takes in different regions, as well as human rights education at the regional level which includes the perspective of human security, has been an aspect highlighted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) as one of the key factors for the reinforcement of the notion of human security as a useful tool in relation to rights; see Benedek, Wolfgang, "Human security and human rights interaction", in Goucha, Moufida and John Crowley (editors), *Rethinking Human Security*, *op. cit.*, pp. 9-12.

³⁸³ UN Human Rights Council, *Guiding principles on extreme poverty and human rights*, (contained in the Final Draft submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, UN General Assembly resolution A/HRC/21/39, 18 July 2012), endorsed by UN Human Rights Council in resolution 21/11 of 27 September 2012, para. 3.

³⁸⁴ See for example Pogge, Thomas, "Severe Poverty as a Human Rights Violation", in *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor*, Oxford University Press, Oxford, 2007; and Salomon, Margot E., "International Human Rights Obligations in Context: Structural Obstacles and the Demands of Global Justice", in

previous section on Human security and human rights Public International Law (II.2.2), human security may prove helpful and even necessary as a bridging conception to shape and unify current debates on the right to development, global justice and the role of the international trading, investment and financial systems, and the involvement of non-State actors, such as transnational and other business corporations, in the field of human rights. Prioritizing critical and widespread vulnerability as its axis, I argue that human security may indeed act as a centripetal force to bring together several contemporary debates and social movements that share the common concern of appalling material deprivation and marginalization experienced by millions of persons worldwide.

In line with the priorities identified in this thesis, let us purposefully recall that

Persons living in poverty are confronted by the most severe obstacles – physical, economic, cultural and social – to *accessing their rights* and entitlements. Consequently, they experience many *interrelated and mutually reinforcing deprivations* – including *dangerous work conditions, unsafe housing, lack of nutritious food, unequal access to justice, lack of political power and limited access to health care* – that *prevent* them from realizing their rights and *perpetuate* their poverty. Persons experiencing extreme poverty live in a *vicious cycle of powerlessness, stigmatization, discrimination, exclusion and material deprivation*, which all *mutually reinforce* one another.³⁸⁵

Such disparities in the enjoyment of the right of access to justice (a typical civil and political right) also determine to a great extent the lack of access of poor people to a whole other set of rights. These asymmetries also often reveal the gendered dimensions of poverty; think for example of the need for a formal legal recognition of land tenure for women that may be rendered justiciable in Court. Certainly, without effective access to justice, people living in poverty are “unable to seek and obtain a remedy for breaches of domestic and international human rights law, exacerbating their *vulnerability, insecurity and isolation*, and perpetuating their impoverishment”.³⁸⁶

Conscious that poverty involves the whole spectrum of human rights, I consider nevertheless that ESC Rights deserve a particular mention in relation to human security for various reasons: i) the historical difficulties faced in relation to the conceptualization or to the justiciability of these human rights, which has in itself represented a risk to their confirmation as proper legal rights; ii) the fact that within the debate on human security, some of the on-going and influential practical measuring exercises focus on the ‘narrow definition’ of human security, only concentrating on the aspect of violent conflict (*freedom from fear*), whereby an integrated consideration that also incorporates socio-economic aspects (*freedom from want*), or even the overarching pillar of *freedom to live in dignity*, merit further attention; iii) the close relationship that has recently been highlighted between poverty, especially extreme poverty, and human rights,³⁸⁷ which calls for deeper analysis of issues of socio-economic inequality, but viewed from International Law and translated into the legal terminology and criteria of rights.

Andreassen, Bard A. and Stephen P. Marks, (editors), *Development as a Human Right: Legal, Political and Economic Dimensions*, second edition, Intersentia, 2010, and by the same author, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, Oxford University Press, 2007.

³⁸⁵ UN Human Rights Council, *Guiding principles on extreme poverty and human rights*, *op. cit.*, para. 4.

³⁸⁶ *Ibid.*, para. 67.

³⁸⁷ See the *Report of the UN Independent Expert on the question of human rights and extreme poverty*, Magdalena Sepúlveda, UN General Assembly, A/64/279, 11 August 2009.

Vulnerability caused by poverty has been at the center of human security concerns since its modern articulation by the UNDP, as reviewed above. The human security lens has also been put to work to analyse particular issues of poverty, inequality, and status of enjoyment of rights, with a focus on urban poverty (especially considering that estimates suggest that by 2050, more than half of the world's population will live in urban settlements).³⁸⁸ Such preoccupations were also specifically picked up since the original UN objectives and human rights instruments, but these realities persist today and in many parts of the world have worsened acutely. Indeed, it has been noted that as of 2004, economic disparities were widening across the globe, a greater percentage of the world's population was on the move as political refugees, asylum seekers, or economic migrants, and education, health care, and the environment were being eroded in the service of privatization and open markets. States, viewed in the early 1990s as accountable for the economic and social security and rights of their citizens, were increasingly stepping back from such responsibilities, especially to the poor.³⁸⁹ So the question arises as to what role has International Human Rights Law -and International Law more generally- played in the face of these critical conditions?

Through the adoption on December 10, 2008, by the UN General Assembly, of the Optional Protocol to the ICESCR,³⁹⁰ all of the rights encompassed in the two main human rights treaties, and which were all recognized on equal footing since the UDHR, may enjoy equivalent defence. It establishes a procedure of communications by individuals or groups of individuals relating to the violation of ESC Rights (article 12), similar to that existing for the ICCPR since its creation. With this, the historic gap between the mechanisms for international legal protection of civil and political rights and those of economic, social and cultural rights is narrowed, thus recognizing the fact that “there is no water-tight division between categories of human rights”, but rather “interdependence and overlap”.³⁹¹ The Optional Protocol specifically recognizes this interdependence in its text by recalling the foundations of ‘freedom from fear’ and ‘from want’ present in the UDHR and ‘the human rights covenants’.³⁹²

In this context, let us just look at an illustrative example of a clear human security challenge regarding poverty-related threats and the right to food. Consider that more than 18 million people are currently struggling through a crisis in the Sahel region of West Africa (Senegal, Mali, Mauritania, Niger, Burkina Faso and Chad). A recent report on the region, focusing particularly on children, indicates that the overarching driver of this crisis is not drought, nor a food deficit. The most vulnerable families are in crisis because they have *no protection against shocks* like grain prices doubling. This is the ‘*resilience deficit*’, rooted in *structural causes*, neglected for too long,

³⁸⁸ See the report produced by the Mexico City Commission of Human Rights, Comisión de Derechos Humanos del Distrito Federal, *Informe sobre Seguridad Humana en la Ciudad de México 2006-2008*, CDHDF, Mexico, 2009; as well as Lemanski, Charlotte, “Everyday human (in)security: Rescaling for the Southern city”, in *Security Dialogue*, February 2012, vol. 43 no. 1, pp. 61-78; and *Gobernanza y Seguridad Urbana y Humana en América Latina*, ONU-Habitat,

http://www.onuhabitat.org/index.php?option=com_docman&task=doc_view&gid=37&tmpl=component&format=raw&Itemid=235

³⁸⁹ See Basch, Linda, “Human security, globalization, and feminist visions”, in *Peace Review*, 16, No. 1, March 2004, p. 6.

³⁹⁰ Optional Protocol to the ICESCR, adopted by the UN General Assembly, A/RES/63/117, December 10, 2008, not yet entered into force at the time of writing.

³⁹¹ Scheinin, Martin, “Human Rights Committee. Not Only a Committee of Civil and Political Rights”, in *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law*, edited by Malcolm Langford, Cambridge University Press, 2008, p. 540.

³⁹² Optional Protocol to the ICESCR, *op. cit.*, O.P. 3.

and exacerbated by exceptionally high food prices. Current estimates suggest that over one million children will face *severe and life-threatening malnutrition* during this crisis. Even in a ‘non-crisis’ year, an estimated 645,000 children die in the Sahel of largely *preventable and treatable causes*, with 226,000 of these deaths being directly linked to malnutrition. People’s access to food at prices they can afford, and their *capacity to absorb or adapt to new shocks* have been severely undermined by the Sahel crises in 2005, 2008 and 2010. The vast majority of the most vulnerable households in the region have had neither the time, nor the necessary support, to get out of debt, or restore their normal means of making a living. These rates demonstrate that traditional development policies are failing to save children in the Sahel from a permanent, large-scale nutrition crisis. Tellingly, the report speaks of an ‘*everyday*’ emergency.³⁹³

Indeed, a human security-sensitive approach to these realities would mean translating this integrative conception into much needed concrete institutional coordination in recognizing that “*structural and systemic inequalities* – social, political, economic and cultural – often remain unaddressed and *further entrench poverty*. A lack of *policy coherence* at the national and international levels frequently *undermines or contradicts* the commitment to combat poverty”.³⁹⁴

Dealing with structural policies, interestingly quite recently the Bulgarian Commission for Protection against Discrimination (CPD), a quasi-judicial equality body with a competence to give legally binding decisions on discrimination complaints, requested in 2011 a preliminary ruling from the Court of Justice of the EU (CJEU) under Article 267 TFEU. The request concerned a case of alleged discrimination against the Roma minority in a Bulgarian city in relation to *electricity services*. However, in order to deal with the substantial questions asked by the CPD, the CJEU first had to decide whether the CPD, entrusted by law with different categories of functions, could be regarded as a court or tribunal within the meaning of Article 267 of the Treaty of Functioning of the EU (TFEU), and thus if the reference was admissible. The admissibility of the reference would have given the CJEU an opportunity to decide on a case of *indirect discrimination* based on ethnic origin and the possibilities for justification of such discrimination (note the similarity of the requested analysis with the cases of *D.H. and Others v. Czech Republic* and *Horváth and Kiss v. Hungary* by the ECHR reviewed above). Although the Opinion of Advocate General Kokott (delivered on 20 September 2012) suggested that the reference was admissible and regarded the CPD in that case as a court or tribunal within the meaning of Article 267 TFEU, the CJEU followed a different approach in its judgment delivered on 31 January 2013 and rejected such interpretation.³⁹⁵

Considering this background, one must also bear in mind that poverty doesn’t strike equally but affects sectors of society that may already be in a situation of vulnerability, such as women, persons of African descent, indigenous peoples, undocumented migrants or persons with disabilities. Indeed, as the UN Special Rapporteur on Extreme Poverty and Human Rights indicated recently in relation to her visit to various countries around the globe, “women face discrimination and are *disproportionately vulnerable* to poverty”.³⁹⁶ Similarly, it has been

³⁹³ Save the Children/World Vision, *Ending the everyday emergency: Resilience and children in the Sahel*, July 2012. Quoted terms in original, emphasis added. The report also signals that acute malnutrition affects 10%-14% of children in Senegal, Mali, Mauritania, Niger and Burkina Faso, and more than 15% of children in Chad.

³⁹⁴ UN Human Rights Council, *Guiding principles on extreme poverty and human rights*, *op. cit.*, para. 5.

³⁹⁵ For a full account, see <http://www.equineteurope.org/CJEU-decides-equality-body-not-a->

³⁹⁶ Opening Statement of Magdalena Sepúlveda Carmona, Special Rapporteur on Extreme Poverty and Human Rights, Human Rights Council 20th session, Geneva, 21 June 2012, p. 4.

emphasized that “Women and girls living in poverty are particularly affected by *gender-based violence* that includes, but is not limited to, domestic violence, sexual abuse and harassment and harmful traditional practices”,³⁹⁷ realisations that are in line with the analysis of Chapter III of this thesis on the different legal definitions of violence against women, including those that include economic harm, and the way such forms of violence and insecurity affect women’s human rights.

Therefore, there seems to be a pressing call to examine further the possible relationship of human security with ESC Rights. To do this, let us turn to the scope of the State’s general obligations in relation to ESC Rights. In this respect, the body in charge of interpreting the Covenant, the UN Committee on ESC Rights,³⁹⁸ has indicated that the State has, as minimum duties towards these rights that are immediately enforceable: i) the obligation to take steps to apply all the provisions of the Covenant observing the principles of progressivity and non-regressivity;³⁹⁹ and ii) the obligation of non-discrimination. Specifically the Committee has clarified that

Non-discrimination is an *immediate and cross-cutting obligation* in the Covenant. Article 2(2) requires States parties to guarantee non-discrimination in the exercise of each of the...rights enshrined in the Covenant and can only be applied in conjunction with these rights...In order to eliminate *substantive discrimination*, States parties may be, and in some cases are, under an *obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination*. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as *interpretation services for linguistic minorities* and *reasonable accommodation* of persons with sensory impairments in accessing health care facilities.⁴⁰⁰

In line with the ‘freedom from fear’ pillar of human security, General Comment No. 4 on *The right to adequate housing* (a right that could seem closer to a ‘freedom from want’ concern), includes the interpretation of the UN Committee on ESC Rights concluding that the right to housing cannot be interpreted in a narrow way merely as a shelter and roof or as a commodity, but rather should be seen as “the right to live somewhere in *security, peace and dignity*”.⁴⁰¹ Indeed, in explaining the proper interpretation of the concept of ‘adequacy’ in the right to adequate housing, the Committee includes as one of its elements that of *legal security of tenure*, and specifies that

...Notwithstanding the type of tenure, all persons should possess a degree of *security of tenure* which guarantees *legal protection against forced eviction, harassment and other*

³⁹⁷ UN Human Rights Council, *Guiding principles on extreme poverty and human rights*, *op. cit.*, para. 63.

³⁹⁸ The Committee was established under United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the ECOSOC in Part IV of the ICESCR, in particular, articles 16.1 and 16.2.a); 17.1; and 18-22.

³⁹⁹ On these two obligations and principles, see UN Committee on ESC Rights, General Comment No. 3, *The nature of States parties obligations*, (Art. 2, *par.1*), 14 December 1990, paras. 2 and 9; Courtis, Christian, “La prohibición de regresividad en materia de derechos sociales: apuntes introductorios”, in Courtis, Christian (compilador), *Ni un paso atrás: La prohibición de regresividad en materia de derechos sociales*, Del Puerto, Buenos Aires, 2006, pp. 3-52; and Abramovich, Victor and Christian Courtis, *Los derechos sociales como derechos exigibles* (Prologue by Luigi Ferrajoli), Editorial Trotta, 2002.

⁴⁰⁰ UN Committee on Economic, Social and Cultural Rights, General Comment No. 20, *Non-Discrimination in Economic, Social and Cultural Rights* (art. 2, *para. 2*), E/C.12/GC/20, 10 June 2009, paras. 7 and 9. Emphasis added.

⁴⁰¹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 4 *The right to adequate housing* (Art. 11 (1) of the Covenant), 13 December 1991 (Contained in document E/1992/23), para. 7.

threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.⁴⁰²

This position was also reinforced in the same Committee's General Comment No. 7, of 1997, *The right to adequate housing (Art. 11 (1) of the Covenant): forced evictions*. Issued only three years after the shift in security conceptions reflected in the 1994 UNDP Human Development Report which articulated the human security idea, in a language close to such understanding and reinforcing the interconnectedness of human rights, the Committee recognized that

The practice of forced evictions is *widespread* and affects persons in both *developed and developing countries*. Owing to the *interrelationship and interdependency which exist among all human rights*, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of *forced evictions may also result in violations of civil and political rights*, such as the right to life, the right to *security of the person*, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.⁴⁰³

Because of this, the Committee reiterates that "forced evictions are considered as *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law."⁴⁰⁴

The Committee also went a step further in 1997 to emphasize the structural and disproportional vulnerability to forced evictions faced by certain persons and sectors of society, notably women, and in line with Chapter III of this thesis, the focused risk to violence they encounter in this context. Duly underlining the connections between different rights, the socio-economic dimensions of violence against women, and the accelerated situation of vulnerability by forced evictions to violations of other human rights, the Committee stressed that "*Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless*".⁴⁰⁵

Thus, the emphasis is not only on physical security of the place of residence but also on the *right of tenants to security of tenure*,⁴⁰⁶ as a certain subtype of human security functioning as a guarantee of freedom of forced evictions which in turn minimizes fear and generates a sense of safety and well-being consonant with the full enjoyment of the right to adequate housing.

The intertwining of the right of security of tenure with the right to non-discrimination and to live free from racism, which can be adequately photographed with a human security lens, also finds a

⁴⁰² *Ibid.*, para. 8,a).

⁴⁰³ UN Committee on ESC Rights, General Comment No. 7, *The right to adequate housing (Art. 11 (1) of the Covenant): forced evictions*, sixteenth session 1997, Contained in document E/1998/22, annex IV, 20 May 1997, para. 4. Emphasis added.

⁴⁰⁴ UN Committee on ESC Rights, General Comment No. 4, *op. cit.*, para. 18. See also the analysis presented in Langford, Malcolm and Jeff A. King, "Committee on Economic, Social and Cultural Rights: Past, Present and Future", *op. cit.*, pp. 417-516.

⁴⁰⁵ UN Committee on ESC Rights, General Comment No. 7, *op. cit.*, para. 10. See also para. 16.

⁴⁰⁶ *Ibid.*, para. 19.

common path in the concerns raised in Chapter IV of this thesis on migrants and other non-citizens. Recent examples of collective expulsions of migrant Roma people from France give an account of enhanced vulnerability to violations that the members of these communities experience.

Such conditions of vulnerability experienced by Roma people have been recently emphasized in a shared statement by the UN experts on Minority Issues, Migrants, Housing and Racism when they signalled in August 2012 that “evictions continue and *threaten to place* families in *highly vulnerable* situations”. Concretely, the UN Special Rapporteur on Human Rights of Migrants, Francois Crépeau, in considering the forced evictions and subsequent expulsions of Roma people carried out by the French authorities in 2010 and 2012, noted that “the ultimate objective seems to be the expulsion of migrant Roma communities from France” and relying on International and European Human Rights Law stressed that “collective expulsion is banned under international law and any repatriation should be voluntary, in compliance with international standards, and based on individual assessment and independent monitoring.”⁴⁰⁷

Indeed, UNDP data studying human security and vulnerability had since some years ago already categorized the population of between 6.8 and 8.7 million Roma people living in Europe as a group “at risk”.⁴⁰⁸ For instance, in Central and Southern Europe, compared to non Roma citizens, Roma are *more likely* to live in poverty, have a *higher risk* of unemployment, stay in school for fewer years, live without access to drinking water, sanitation and electricity, and live in substandard, overcrowded homes. Roma are *more likely* to suffer from chronic illness and have less access to health services. To give but a recent example of how Roma people experience ESC Rights, a survey of 2011 of 11 EU Member States (including Western European States), demonstrates that Roma are more likely to live in poverty than non-Roma who live in the same area: about 90 percent of Roma surveyed live in households below national poverty lines, and around 40 percent of Roma live in households where somebody went to bed hungry at least once in the last month because they could not afford to buy food.⁴⁰⁹

Accounts of social exclusion and discrimination in the field of education also provide a clear picture of the interrelated risks to rights for Roma people.⁴¹⁰ In terms of vulnerability in its conception of higher degree of exposure to human rights violations as described, it is not, of course, a coincidence that in *D.H. and Others v. the Czech Republic*, and the recent case of *Horváth and Kiss v. Hungary* of 2013, referred to above, the ECHR concluded that indirect discrimination had been practiced against Roma children within the schooling system of both countries, thereby affecting their equal right to education. The cases of *D.H. and Others* and *Horváth and Kiss* also make evident the need for a stronger and more efficient dialogue between

⁴⁰⁷ UNOHCHR, Press Release by the UN Independent Expert on Minorities and the Special Rapporteurs on the Right to Adequate Housing, Human Rights of Migrants, and Elimination of Racism, “Roma evictions / expulsions: ‘France must comply with international non-discrimination standards’ ”, Geneva, 29 August 2012, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12466&LangID=E> The prohibition of collective expulsions is contained in Protocol 4 of the ECoHR, in article 19.1 of the EU Charter on Fundamental Rights; and in article 22 of the ACoHR. See also Article 7 of the 1985 *UN Declaration on the human rights of individuals who are not nationals of the country in which they live*, adopted by General Assembly resolution 40/144 of 13 December 1985.

⁴⁰⁸ See UNDP, *At Risk: Roma and the Displaced in Southeast Europe*, UNDP Regional Bureau for Europe and the Commonwealth of Independent States, Bratislava, 2006, for in depth analysis of survey data compiled in 2004, and comparison between monitoring levels of human security and assessing levels of vulnerability, pp. 3-8.

⁴⁰⁹ EU Fundamental Rights Agency/UNDP/European Commission, *The situation of Roma people in 11 EU Member States: survey results at a glance*, EU FRA/UNDP/EC, Luxembourg, 2012, p. 12.

⁴¹⁰ *Ibid.*, pp. 12-15.

policy-makers, development specialists and the (human rights) legal community, when the vulnerability of Roma people had already been identified and was not adequately dealt with, thus resulting in human rights violations adjudicated internationally. Certainly, the reference of human rights and development as ‘ships passing in the night’ by Philip Alston⁴¹¹ seems to crudely come into play harming people’s everyday lives. The human security-human rights framework proposed in this thesis may foster such a conversation under a common umbrella that covers these different concerns and confronts them preventively in a timely manner, at the same time grounding them with a solid normative basis.

In the theme of human rights of migrants and other non citizens -dealt with at length in Chapter IV of this thesis- and its relation to ESC Rights, the ECHR recently indicated in *Sufi and Elmi v. the United Kingdom*, involving two persons at risk of being returned to Somalia, that in examining the case of applicants under a threat of expulsion as related to article 3 (principle of *non refoulment*), it favoured the approach of *M.S.S. v. Belgium and Greece* and not that of *N. v. UK* (both cases analysed in Chapter IV) in the sense that the first required taking due regard of the ability of a person to “cater for his most basic needs”, including basic levels of food, hygiene, shelter and social support abroad, and granting weight to his *vulnerability* to ill-treatment upon return and the prospect of his situation improving within a reasonable time-frame.⁴¹² In *Sufi and Elmi*, the Court made use of a wide array of UN and NGO reports, and even news releases and a map of Somalia, as sources of argumentation to assess the country situation. In using these resources, it explicitly mentioned “food security” concerns in relation to the country and referred to the evaluations of the Food Security and Nutrition Analysis Unit of the World Food Programme as evidence for a comprehensive understanding of the devastating, severe and extended human rights situation of risk that the applicants would eventually be returned to. Based on this ample and partly non-traditional spectrum of sources, the Court concluded that a violation of article 3 would be produced if the applicants were removed to Somalia and, different to *N. v. UK*, in this case, granted a human security-protective outcome.⁴¹³

The close links between the risks to civil and political rights and ESC Rights brought to light through these cases opens the path for the proposed human security/human rights lens. Such a perspective can constitute a useful tool to identify and analyse levels of widespread vulnerability and reaffirm the consequent heightened obligation of protection, by the State but also in terms of inter-State duties in a broader view of the transnational and international dimensions of human rights enjoyment.

At the Inter-American level it seems the Court has addressed more straightforwardly the obligation of taking active measures to counter socio-economic vulnerability, without tackling it only as a matter of (indirect) discrimination as in the ECHR. It is true as well that some cases are of such a grave nature, for instance, the death of members of an indigenous community, including children, due to the devastating levels of deprivation and scarcity that they suffered, that they would not merit a less decided response. Indeed, in the case of *Xakmok Kásek v. Paraguay*, in applying

⁴¹¹ Alston, Philip, “Ships Passing in the Night: the Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals”, in *Human Rights Quarterly*, No. 27, pp. 755-829.

⁴¹² See *Sufi and Elmi v. the United Kingdom*, Appl. Nos. 8319/07 and 11449/07, 28 June 2011, paras. 279 and 283, emphasis added; *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011, paras. 246 and 254; *D. v. the United Kingdom*, Appl. No. 30240/96, ECHR Reports 1997-III, paras. 52-53; and ECHR, *N. v. United Kingdom* (GC), Appl. No. 26565/05, 27 May 2008, paras. 18 and 19.

⁴¹³ ECHR, *Sufi and Elmi v. UK*, *op. cit.*, paras. 113 and 118; for the whole range of employed sources, see paras 80-195 and the map on p. 77.

threshold criteria and assessing the critical collective situation of “particular vulnerability” and the “structural discrimination” experienced by the indigenous community, the Court explicitly stressed the state’s violation of an obligation to prevent the deaths of some of its members by not having attended the *known risk* on time. In a similar way to *Cotton Field*, it also transported the structural dimension of the violations up to the realm of reparations and it determined as one of the measures of redress that the state take actions to guarantee “food security”, “health security” and water and sanitation infrastructure for the indigenous community within a period of two years, thus building explicitly on the human security language and concept to address collective conditions of vulnerability in the field of human rights law.⁴¹⁴

In an illuminating paragraph on how precisely a concrete human security analysis applied to legal interpretation would look like in the case of extreme poverty and socio-economic vulnerability, in the 2010 case of the *Xakmok Kásek Community v. Paraguay*, even reaching the extreme of death of several members of the indigenous community, including children, the Court highlighted that

the fact that the State is currently providing emergency aid does not exempt it from international responsibility for having failed to take measures in the past to *prevent the risk* of a violation to the right to life *from materializing*. The Court therefore must examine which of the deaths are attributable to the State for failing in its duty to prevent them. This examination will be stem from a perspective that allows for the situation of *extreme and particular vulnerability*, the *cause of death*, and the corresponding *causal link* between them *to be connected*, without placing on the State the *undue burden* of overcoming an *indeterminate or unknown risk*.⁴¹⁵

In the previous 2006 case of the *Sawhoyamaxe Indigenous Community v. Paraguay*, involving non-citizens, namely internally displaced persons, Judge Cançado Trindade also gave life to a concrete mode of applying the human security/human rights symbiosis through judicial interpretation, as described above.⁴¹⁶

This proposed framework of analysis would also go in line with interpretation by the UN Committee on ESC Rights which details the circumstances in which a *reversal of the burden of proof* is allowed or even called for. States are under a legal obligation according to the ICESCR to use the maximum of their available resources to assure rights, privileging the most vulnerable groups and those with the most urgent needs. In this respect, diligence in the adoption of these measures cannot be presumed and States must demonstrate the steps they are taking to prioritize the protection of at least the minimum core of such rights even in time of crisis or resource constraints.⁴¹⁷ Note the similarity between the language of ‘minimum core’ of rights used by the

⁴¹⁴ IACHR, *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, 24 August 2010 (Merits, reparations and costs), paras. 227, 265 and 323.

⁴¹⁵ IACHR, *Xákmok Kásek Indigenous Community v. Paraguay*, 24 August 2010 (Merits, reparations and costs), para. 227.

⁴¹⁶ See Inter-American Court of Human Rights, *Case of the Sawhoyamaxe Indigenous Community v. Paraguay*, Judgment of March 29, 2006 (Merits, Reparations and Costs), Separate Opinion of Judge A. A. Cançado Trindade, supporting his argument on the work of M. Stavropoulou, “Searching for Human Security and Dignity: Human Rights, Refugees, and the Internally Displaced”, in *The Universal Declaration of Human Rights: Fifty Years and Beyond* (eds. Y. Danieli, E. Stamatopoulou and C.J. Dias), Amityville/N.Y., Baywood Publ. Co., 1999, pages 181-182; at para. 14, footnote 20.

⁴¹⁷ See article 2.1 of the ICESCR and UN Committee on ESCR, General Comment No. 3 *The nature of States parties obligations* (Art. 2, par.1 of the Covenant), 14 December 1990 (contained in Document E/1991/23), paras. 10-13. See also UN Committee on ESC Rights, *General Comment No. 9, The domestic application of the Covenant*,

Committee and that of the ‘vital core’ of all human lives as proposed by the human security definition. In the Committee’s views, as Gerardo Pisarello has also signalled, the existence of an asymmetric relationship of subordination and defencelessness between two subjects, individual or collective, authorizes for the reversal of the burden of proof in the case of a presumed violation of a right. In this sense, he has considered ESC Rights as freedom rights, borrowing partly from Amartya Sen’s idea of development as freedom, insofar as the lack of their enjoyment in an extreme degree leads to the annulment of freedom.⁴¹⁸ Thus the importance of prioritizing attention to the most vulnerable persons, who are placed at a higher risk of violation of their human rights. The notion of human security helps to highlight this condition of risk and vulnerability in a way that is relevant for the law, as depicted through this work.

From the more general standpoint of the human security-human rights interaction, one may also underline that the *lack of full justiciability* of ESC Rights is in itself a *risk for their full enjoyment*, given that the absence of access to justice (not only at the factual but also at the institutionalized level) undermines the whole concept of ‘legal right’. Because of the obstacles some have constructed to the possibility of judicial demand of these rights, it has been noted that one methodology to deal with the issue of justiciability in the context of economic and social rights is the *integrated approach* which underlines the interdependence and interaction of all human rights.⁴¹⁹ At the same time, the UN Committee on ESC Rights has also noted that the ICESCR contains no direct counterpart to article 2, paragraph 3 (b), of the International Covenant on Civil and Political Rights, which obligates States parties to, *inter alia*, to “develop the possibilities of judicial remedy”. Nevertheless, a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not “appropriate means” within the terms of article 2, paragraph 1, of the ICESCR, or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.⁴²⁰ In this sense, in terms of the justiciability of ESC Rights, the UN Committee had reaffirmed since 1998 that “the adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the *most vulnerable and disadvantaged groups in society*”.⁴²¹

The positive and negative obligations with regards to ESC Rights have been extensively analysed,⁴²² and within the legal analysis carried out by human rights bodies, the scope of these

E/C.12/1998/24, (General Comments), 3 December 1998, on the burden of proof in relation to the duty to give effect to the Covenant in the domestic legal order, para. 3.

⁴¹⁸ Pisarello, Gerardo, “Los derechos humanos de los migrantes”, in Añón, María José (editor), *La universalidad de los derechos sociales: el reto de la inmigración*, Tirant lo Blanch, Valencia, Spain, 2004, pp. 58 and 70.

⁴¹⁹ Krause, Catarina and Martin Scheinin, “The Right Not to be Discriminated Against: The Case of Social Security”, in Orlin, Theodore, S., Allan Rosas and Martin Scheinin (editors), *The Jurisprudence of Human Rights Law: A Comparative and Interpretive Approach*, Institute for Human Rights, Åbo Akademi University, Turku/Åbo, Finland, 2000, p. 255.

⁴²⁰ UN Committee on ESCR, *General Comment No. 9, The domestic application of the Covenant*, E/C.12/1998/24, *op. cit.*, para. 3.

⁴²¹ *Ibid.*, para. 10. Emphasis added.

⁴²² See for example Liebenberg, Sandra, “South Africa: Adjudicating Social Rights Under a Transformative Constitution”, in *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law*, edited by Malcolm Langford, Cambridge University Press, 2008, in particular pp. 82-95.

obligations has also been developed further. Within the Inter-American system of human rights, for example, the basis for justiciability of ESC Rights has recently been emphasized and steps have been taken to make this goal operational through a systematization of the best practices in the region, which indicates as a starting point that:

International human rights law has developed standards on the *right of access to judicial and other remedies* that serve as suitable and effective grievance mechanisms against violations of human rights. In that sense, States not only have a *negative obligation* not to obstruct access to those remedies but, in particular, a *positive duty* to organize their institutional apparatus so that all individuals can access those remedies. To that end, states are required to *remove any regulatory, social, or economic obstacles* that prevent or hinder the possibility of *access to justice*.

In recent years, the Inter-American system of human rights...has recognized the need to outline principles and standards on the scope of the *rights to a fair trial and effective judicial protection* in cases involving violation of *economic, social and cultural rights*.⁴²³

However, because of its accent on interrelatedness, it is particularly useful to look at human security and human rights borrowing from the concept of the *continuum* of obligations, proposed especially in the context of ESC Rights. This continuum covers a series of legal obligations, ranging from negative to positive, in relation to all human rights, and thus reaffirms the interdependent nature of all these rights.⁴²⁴

Indeed, the International Court of Justice (ICJ) has concluded that the UN International Covenant on Economic, Social and Cultural Rights is applicable independently of the existence of a situation of peace and stability and should also be implemented in all its terms during times of armed conflict or in general in a “conflict situation”. Contrary to the view that only International Humanitarian Law -which requires a lower set of obligations regarding human rights-, is applicable during time of conflict, and that the higher standard of International Human Rights Law is a suitable legal regime only for times of peace, the Court has affirmed that: “...the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.” And then, in examining the validity of Israel’s argument that only International Humanitarian Law applies in times of conflict and concerning the legal status of ESC Rights in such times, the Court emphasizes that the exercise of territorial jurisdiction as an occupying Power, also entails being bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. It also implies not raising any obstacle to the exercise of

⁴²³ IACoHR, *Access to justice as a guarantee of economic, social, and cultural rights: a review of the standards adopted by the Inter-American system of human rights*, Organization of American States, OEA/Ser.L/V/II.129, Doc. 4, 7 September 2007, points 1 and 2. Emphasis added. On ESC Rights in the Inter-American system, see also Rossi, Julieta and Victor Abramovich, “La tutela de los derechos económicos, sociales y culturales en el artículo 26 de la Convención Americana sobre Derechos Humanos”, in Martin, Claudia, Diego Rodríguez-Pinzón and José A. Guevara B. (editors), *Derecho Internacional de los Derechos Humanos*, Universidad Iberoamericana Mexico City, American University Washington College of Law and Distribuciones Fontamara, Ciudad de México, 2004, pp. 457-478.

⁴²⁴ See Sepúlveda, Magdalena, *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, *op. cit.*, Chapter V.; and Koch, Ida Elisabeth, “Dichotomies, trichotomies, or waves of duties?”, in *Human Rights Law Review*, n.o 5/1, Oxford 2005, p. 81.

such rights in those fields where competence has been transferred to Palestinian authorities.⁴²⁵

A recent account of such interconnectedness can be found in the observations made by the UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, when she reminds us that: “Eliminating inequalities can start in the most unlikely of places: a toilet”. Indeed, the crude reality is that every day, 7,500 people die due to a lack of sanitation, 5,000 of whom are less than 5 years old. Every year, 272 million schooldays are missed due to water-borne or sanitation-related diseases. One of the most critical challenges is the high number of people still practicing open defecation on a daily basis – over 1 billion, producing enough faeces to fill a football stadium every day. The Special Rapporteur noted that when there is no toilet in the workplace and no toilet at home, the person has to find every single day a quiet, secluded spot. And in a clear outlook of the gendered dimension of this experience, she emphasized “the *insecurity and indignity* of the situation – especially if you are a *woman*”. Such an account also reiterates that people who do not have access to adequate sanitation are overwhelmingly people living in poverty, and marginalised and excluded individuals and groups, and the UN Millennium Development Goals have not provided a solution to resolve this gap in equality of access.⁴²⁶

As it has already been analysed in the relationship of human security to Public International Law above, sustaining a holistic approach that encompasses the protection from risks of *all human rights* –civil, political, economic, social and cultural- as the central element of *security concerns*, and combining it with the principle of interdependence of all human rights in an integrated approach, leads to the proposal that at least the ‘*minimum core*’⁴²⁷ of all human rights would have to be taken into account in any understanding of security, in armed conflict or not, and in connection with the identification of serious threats and risks that cause *structural vulnerabilities* in a context-specific approach.

Under this view, the emerging notion of human security would form part of a long line of legal and political instruments that have been used in modern law and discourse to forward social justice and equality. Consequently, apart from the conceptual validity of the connection, there seems to be a clear *strategic advantage* in exploring further the links in International Law between human security and human rights, specifically ESC Rights, as well as certain thematic topics as the human rights of women and girls, or the human rights of non-citizens, subsequently reviewed in Chapters III and IV, and viewing them as part of a shared ethical and legal project based on the common value of human dignity. This quest for the most fundamental values of humanity has been worked upon, among other disciplines, through International Law –especially in its more recent development throughout the twentieth and early twenty-first centuries-, in using the theoretical and methodological approach of placing people, and not the State, at the center of these norms.⁴²⁸

⁴²⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, International Court of Justice, Reports 2004, paras. 106 and 112.

⁴²⁶ See OHCHR, “Of all places...a toilet”, Monday 19 November 2012 World Toilet Day, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12806&LangID=E>

⁴²⁷ This concept developed initially mainly in relation to ESC Rights; see UN Committee on ESC Rights, General Comment No. 3, *The nature of States parties obligations* (Art. 2, par.1), 14 December 1990, especially para. 10.

⁴²⁸ See the explanation on the use of these same arguments in favor of a common responsibility for the security of individuals in different parts of the world as an interrelated and mutually dependant phenomenon, and therefore as a matter of shared concern and common values, in Von Tigerstrom, *op. cit.*, pp. 54-57. This type of moral cosmopolitanism has also been applied in the international debate on R2P mentioned in Chapter I above.

As to the adequate institutional framework to confront these interrelated factors at the international level, “there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of *international peace and security*...It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their *humanitarian, social and economic aspects*”.⁴²⁹ This would seem to go in line with the current treatment of human security as a generalized and broad concern dealt with through the General Assembly and the recent UNSG’s *Second Report on Human Security*, of 2012, examined above.

II.3 Strengthening dialogue: human security and human rights

Law cannot and should not remain indifferent in the face of risk. As has been argued in this part of the thesis, the main distinctive element between human security and human rights is the element of *risk* or *vulnerability*. In this sense, following from the universality, interdependence and indivisibility of human rights, it has been proposed to consider through an integrated approach, that *all* human rights are at the centre of human security, and that the differentiating element, the one that unites the two notions and therefore makes it significant both for rights and for security, is precisely the component of serious threats or risk situations that allow for conditions of structural vulnerability, as was also pointed out in the working understanding.

It is suggested in this text that human security reaches spaces which the concepts of personal security, social security and citizen security do not. As was seen above, security holds a factual dimension and also a normative dimension. With regards to its normative character, in terms of human rights, human security includes all human rights and covers therefore the rights to personal security, social security, security of tenure and food security (for women) as contemplated in International Human Rights Law, as well as the elements of citizen security as articulated in the Inter-American system of human rights. But it also extends to risks, threats and sudden changes not fully considered by these concepts or by these specific rights. To give but a few examples, one may think of forced displacement due to climate change, or risks to the right to health or the right to a healthy environment.

It is then not enough to look at each right separately or to examine them in a joint manner simply as the sum of many rights, to fully grasp their level of enjoyment or understand the nature of the violations that affect them, as it also occurs for example, in the areas of sustainable development or self-determination. In the realm of self-determination of indigenous peoples, to provide an illustrative comparison, it has been pointed out that this right encompasses a whole series of human rights (e.g., rights over land and natural resources, non-discrimination, cultural integrity and self-government), given that *all of them are necessary to enable the full exercise* of self-determination, an approach which illustrates the *interdependent and indivisible* character of human rights. Only by searching, even in separate legal instruments, for the elements of a certain broad idea, principle or right, such as that of self-determination, are we able to list these *co-related rights* and appreciate the whole potential of the right of self-determination in itself, as well as its

⁴²⁹ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *op. cit.*, p. 136, para. 27. Emphasis added.

*applicability as the combination of different rights.*⁴³⁰

Similarly, it has been submitted that human security has a potential to function as an *integrating bridge* between correlated ideas and norms, in this case, those that allow attention to interrelated risks to human rights that place persons in a situation of vulnerability. The result of looking at the connection between the *core content* of human rights and viewing them integrally may be considered in fact *human security*. Under this light, human security refers not only to the protection from severe threats and risks described in the working understanding, but becomes also a *guarantee* at the collective level, a general condition which is necessary to allow the full enjoyment of all human rights by all persons, and which complements the individualist basis of human rights.⁴³¹ Applying this focus, human security also holds the potential of reinforcing the correlative obligations of the State and other actors in relation to such rights, as represented graphically through some illustrative rights in **Table 5** above.

Thus, it is considered appropriate and even constructive to use the reviewed international legal tools to attend some of the new challenges for humanity that the notion of human security has helped to identify by applying the people-centred approach, many of them closely related to the possibility of human beings to fully enjoy all human rights.

Lastly, it can be observed that given the very recent increase in the academic and practical usage of the notion of human security, and the on-going debate in this respect at the UN level, the theme is gaining an important *momentum*, for which legal scholarship should have an answer and continue reflection on the potentials of human security as a catalyst for the improvement of the lives and rights of human beings, in particular, those who face more critical conditions of vulnerability.

With the foundations of the theoretical background of the human security-human rights intersection, the next step is to examine these proposals in light of their practical application to the legal evaluation of two issues that entail widespread situations of structural vulnerabilities—although in different degrees- in societies with diverse political regimes, including liberal democracies, and in countries of all levels of development: i) violence against women and the human rights of women and girls; and ii) human rights of undocumented migrants and other non-citizens.

⁴³⁰ See Scheinin, Martin, “The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land”, in Orlin, Theodore, S., Allan Rosas and Martin Scheinin (editors), *The Jurisprudence of Human Rights Law: A Comparative and Interpretive Approach*, *op. cit.*, p. 162. Emphasis added.

⁴³¹ To return to the example of indigenous peoples, “[T]he desirable *human security situation* [for indigenous peoples] exists when the people concerned and its individual members have adequate *legal and political guarantees* for their fundamental rights and freedoms, including the right of self-determination”; see Henriksen, J.B. *op. cit.*, p. 226, quoted in UN Commission on Human Rights, Sixty-second session, Working group established in accordance with Commission on Human Rights resolution 1995/32, Eleventh session, Geneva, 5 – 16 December 2005, “General Provisions” of the Draft U.N. Declaration on the Rights of Indigenous Peoples, E/CN.4/2005/WG.15/CRP.2, 24 November 2005, pp. 19-20.

PART 2. PRACTICAL APPLICATIONS OF A HUMAN SECURITY APPROACH IN THE LEGAL ANALYSIS OF HUMAN RIGHTS

As was described in the Introduction above, the second part of this thesis moves on to apply the conceptual outlines analysed in **Part 1**, that is, the general notion of human security discussed in Chapter I, and the human security/human rights framework studied in Chapter II., in relation specifically to two thematic cores under human rights law: violence against women and girls, on the one hand; and on the other, human rights of non-citizens, in particular, undocumented migrants. The aim is to evaluate the human security framework of analysis proposed throughout this text as applied to two of the most pressing global concerns today.

The first, violence against women and girls, is one of the most pervasive and widespread threats to a great sector of the population –more than half worldwide-, even in well-off and/or democratic societies, otherwise considered ‘peaceful’. The second, the human rights of undocumented migrants, poses legal questions at the conceptual level in terms of the universality of human rights when considered in light of legal status. Other challenges emerge also in the practical sphere, whilst the lack of protection towards undocumented migrants has been aggravated with the economic crises in the US and Europe, together with new interrogations derived from the Arab Spring. The issue of undocumented migration also connects to most countries in the world, whether as sending, transit or host societies.

Both themes, violence against women (VAW) and violations to rights of undocumented migrants, find a common denominator in being present in liberal democratic polities holding generally acceptable records in human rights’ respect, and, more importantly, they enter the realm of structural vulnerabilities which are faced by considerable sectors of the population. These vulnerabilities are, nonetheless, confronted with gaps in human rights law and/or implementation that have been insufficient in addressing concerns on both topics. These cracks in the system allow for thousands of persons to fall between norms, to remain unprotected and, in some cases, to confront life-threatening situations. Also, the threats to human security in the form of socio-economic deprivation, as evidenced in the section of human security and ESC Rights, are a *cross-cutting issue* placing both women and girls facing violence as well as undocumented migrants - often poor and socially marginalized-, in heightened conditions of vulnerability. It is not a coincidence that legal, philosophical, political and sociological scholarship, international and inter-governmental organizations’ reports, human rights universal and regional mechanisms and multiple civil society activities have recently centered their radar on prioritizing both issues in their agenda. Thus, the present text analyses whether human rights law has something more to offer in the face of these challenges and, if so, how it may do so effectively in order to deliver some of the promises envisioned by the human rights spirit and the legal architecture constructed around it.

Thus, in Chapter III, the text will look more closely at the general conception of human security discussed in Chapter I in relation specifically to violence against women and girls and their human rights. It will first reflect critically on how a gendered human security would have to be shaped (section III.2).⁴³² The chapter examines this relationship in the form of an in-depth thematic study

⁴³² As was referred to above, it must be recalled that violence against women is conceived as a subcategory of gender-based violence. This last type of violence also covers for example the experiences of male violence against gay men,

covering the normative landscapes of the UN, the Inter-American, European and African human rights' systems. It also reviews paradigmatic cases resolved by the Inter-American and European Courts of Human Rights as exemplifying some of the potentials of the human security-human rights symbiosis (section III.3). Considering the human security approach to critical risks and vulnerabilities, this chapter explores VAW as one of the most pervasive and widespread threats worldwide. At the same time, the concept of violence against women and girls has been strongly developed by International Human Rights Law, although seldom taken into account explicitly in human security concerns relating to violence. Thus, in the last part (section III.4), the chapter examines the consequences of the interaction of applying a human security lens to the legal analysis of violence against women and their human rights, and of including the human rights definition of violence against women within the human security sphere, with the aim of fleshing out the added value of this dialogue and bringing to light the synergies between human security and human rights of women and girls to move forward in this debate.

In Chapter IV of this thesis, the existing international human rights law applicable to migrants, in particular undocumented migrants and other non-citizens, is analysed, taking the UN standards as a central departing point and reviewing the regional standards on the subject (section IV.2). The chapter will then sketch out the interconnections between human security and human rights of undocumented migrant persons, at the empirical level as well as in legal analysis, by viewing legal irregularity as a source of risk (section IV.3). This part also includes a particular section on the application of the gendered human security lens as proposed in Chapter III to spell out the particular risks and types of violence faced by undocumented migrant girls and women, as well as the vulnerabilities experienced more specifically by female undocumented migrant domestic workers. Similarly, it reflects on the specific risks confronted by asylum-seekers in a time when economic crisis and mixed flows of migration allow for weakening protection of this group of non-citizens. More generally, the human security approach facilitates the identification of risks to several human rights of undocumented migrants, quite notably that of access to justice. In the last part (section IV.4) the text will draw the picture of how some of the categorised normative tools may be utilized to enhance human rights protection when applied through a human security-based approach. It will analyse illustrative quasi-judicial and judicial cases from the UN and regional human rights' systems in order to exemplify how a human security-sensitive perspective may orient human rights' interpretation when put to work in practice, as well as the consequences that may unfold when it is overlooked. The chapter concludes in section IV.5 with some reflections on the right to have access to rights as a necessary human security requirement for the respect and fulfilment of the universal human rights of undocumented migrants.

This thesis proposes a different framework of analysis to reshape the way we traditionally think of security and its legal implications in relation to human rights. Chapters III and IV in particular, put forward ways in which this framework could be applied in the practical arena of the legal evaluation of human rights violations, especially quasi-judicial and judicial evaluations, as well as

of violence based on gender by women or men against transgender persons, or of women against women in the absence of their performance of expected gender roles; in this sense see the analysis by Leach, Fiona and Sara Humphreys, "Gender violence in schools: taking the 'girls as victims' discourse forward", *op. cit.* However, women and girls "constitute the majority of victims of gender-based violence and men the majority of perpetrators"; Hayes, Ceri, "Tackling violence against women: a worldwide approach", in Terry, Geraldine and Joanna Hoare, (editors), *Gender-Based Violence, op. cit.*, p. 2. Therefore, for the effects of our analysis, this text considers gender-based violence in its most frequent understanding as violence against women and girls (VAW) and concentrates on VAW as the most widespread and illustrative form of gender-based violence, and also as a human rights violation which has been dealt with extensively by International Human Rights Law.

agenda setting for the construction of norms and policies in a concrete area of human rights, for instance, human rights of women and girls, as well as human rights of non-citizens, particularly undocumented migrants.

By means of studying these points, the text concludes in Chapter V as to some ways in which the human security/human rights symbiosis may contribute to a more integrated and holistic understanding of the state's or other actors' human rights obligations in the context of vulnerability and thus proposes a series of *interpretative synergies* to advance this goal and hopefully broaden the existing boundaries of international law. The thesis argues that human security with its accent on critical and widespread threats, and therefore on the collective dimension of risks, should be seen as a pre-condition and at times a necessary complement for the exercise and enjoyment of individual human rights which, when viewed each one on its own footing, may tell us a somewhat incomplete story of the realities that people are facing on the ground.

At the same time, the text suggests approaches by which the notion of human security would become more precise by way of a normative analysis through international human rights law, and thereby define more clearly its scope and content. In building the path of this examination, the following chapters intend to evaluate some of the limitations and potentials at the international, national and local level, of the human security-human rights symbiosis and the implications it may hold for the everyday lives of persons and groups, particularly those in conditions of structural vulnerability.

Chapter III. Violence against women, human security, and women's human rights

Gender-based violence is perhaps the most wide-spread and socially tolerated of human rights violations. It both reflects and reinforces inequities between men and women and compromises the health, dignity, security and autonomy of its victims

UN Population Fund⁴³³

III.1 Introduction

It has become clear in recent years that women are often the worst victims of violence in times of conflict: they form the majority of civilian deaths, the majority of refugees, and are often the victims of cruel and degrading practices, such as rape and other forms of sexual violence.⁴³⁴ However, women's basic well-being is also severely threatened in daily life by unequal access to resources, services and opportunities, not to mention the many forms of violence women experience under 'ordinary circumstances'. By making the security and basic well-being of persons its main concern, the concept of human security is able to capture this broader range of threats and risks and to raise the need to address violence, whether interpersonal, inter-group, internal or international, as well as systemic and extreme forms of deprivation and precariousness. It is therefore not surprising that the appearance of the concept was celebrated as offering new lenses through which to understand the difficulties women and girls encounter to live a life free from fear and deprivation.⁴³⁵

As it was described in Chapter I., the idea of human security looks at the security of persons and reflects this broader range of threats and risks that people and communities face in the context of both violence, whether interpersonal, inter-group or international, as well systemic and extreme deprivation and precariousness.

Although there is a general understanding that a human security analysis and the human rights framework somehow intersect, the bodies of literature that deal with each have so far failed to adequately spell out more specifically the ways in which the two concepts can mutually reinforce each other. They have also fallen short in examining how such reinforcement may contribute in the fight against the multiple forms of violence women and girls experience. Thus, this chapter wishes to further stress the need to provide the notion of human security with a stronger human rights and

⁴³³ UN Population Fund, 2005, quoted in Nedelsky, Jennifer, *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, Oxford University Press, New York, 2011. I am aware of Jennifer Nedelsky's very interesting proposal of "relational autonomy" as a path to transcend the liberal individualist view of autonomy and better understand the human condition, social interaction and the relationship between individuals, groups, the State and other forms of power, including in the issue of violence against women. The present work has, however, chosen the frame of human security with its consequent accent on vulnerability as the relevant avenue to explore violence against women, with the hope of contributing as well to the reflection of forms to adequately weigh social context as the facilitating background of individual experiences of harm, violence and deprivation.

⁴³⁴ See the report *Global Burden of Armed Violence 2011*, specifically Chapter 4, "When the Victim is a Woman", Geneva Declaration Secretariat, Geneva, pp. 113-144.

⁴³⁵ See Basch, Linda, "Human security, globalization, and feminist visions", *op. cit.*, and O'Manique, Colleen, "The 'Securitization' of HIV/AIDS in Sub-Saharan Africa: A Critical Feminist Lens", in *A Decade of Human Security. Global Governance and New Multilateralisms*, edited by MacLean, Sandra J., David R. Black and Timothy M. Shaw, Ashgate, England/USA, 2006, pp. 161-176.

gender component. At the same time it seeks to flesh out ways in which the notion of human security can contribute to a more comprehensive understanding of human rights of women and girls and the set of State obligations that their protection requires. The chapter then presents some proposals on how to advance fruitful synergies between both notions, spelling out some of the benefits that this may specifically entail for women and girls in general and for their right to live a life free from violence in particular.

To flesh out the relationship between human security, violence against women (VAW) and human rights, section III.2 reviews the emerging and competing conceptions of human security presented in Chapter I, and assesses their strong points and limitations, especially in view of their potential to duly reflect VAW as a basic threat to women's and girls' security. In particular, this chapter argues for the added value of a human rights-based approach to human security and its gender implications (III.2.1) and defends a definition of human security which, by focusing on the severity of threats and risks, invites a gendered and human-rights dimension to come to the fore. The rest of the chapter attempts to exemplify the potential of the mutual reinforcement of the concepts of human security and human rights of women. In particular, section III.3 discusses the concepts of violence under human security and that of violence against women under human rights-law and suggests that international human rights instruments on the rights of women and girls, may serve to give content and precision to a gender sensitive idea of human security. Finally, section III.4 explores the inverse relationship, i.e., the ways in which the idea of human security can contribute to the understanding of women's human rights and resulting State obligations in contexts of structural vulnerability, through the analysis of paradigmatic cases from the European and Inter-American human rights' systems. The chapter finalizes by suggesting that there are certain *synergies* to be found between human security and human rights which may prove useful to ensure women's and girls' life free of violence, as developed further in the concluding Chapter V of this text.

III.2 Human security and its gender implications

As it was discussed in Chapter I, security of the State was commonly interpreted as protecting its territorial integrity and its sovereign powers and the security of individual human beings, and in particular women and girls, was largely ignored. We have also gone through the history of how the modern idea of human security emerged as a post-Cold War answer to threats that had been overlooked by State-centred conceptions of national, military and territorial security,⁴³⁶ as well as to new risks posed by the process of globalization and other transnational phenomena, intra-State violence, sudden economic downturns, environmental dangers and global infectious diseases as HIV/AIDS, all of which create mutual and interlinked vulnerabilities for persons around the world.

In the face of these new realities, the contemporary idea of human security was first born in connection with development. As it was already described, it was initially referred to by the UN Security Council and the UN Secretary General in 1992, presented as an autonomous concept in 1993 by the United Nations Development Program (UNDP), and then fully articulated by Mahbub ul-Haq through the 1994 UNDP Annual Report on Human Development.⁴³⁷ The concept coined in the Report was ambitious and sought to express in a comprehensive manner the possibility of multiple threats to individuals' and groups' basic well-being. Following-up on the account of the

⁴³⁶ MacFarlane and Foong Khong, *op. cit.*, p. 20.

⁴³⁷ UNDP, *Human Development Reports*, 1993 and 1994, in <http://hdr.undp.org/en/reports/>

report presented in Chapter I above, three forms of comprehensiveness of the concept as coined by the UNDP Report are worth underscoring.

First, and in the context of the 1993 Vienna Declaration which affirmed the universality, indivisibility and interdependence of human rights, the Report contributed to bridge the civil-political/socio-economic and cultural divide or hierarchy of rights and interests. It achieved this through following the original wording of the 1945 United Nations (UN) Charter which expressed in its Preamble the Parties' commitment "to promote social progress and better standards of life in larger freedom", as well as the views of the founders of the UN that considered security as covering both *freedom from fear* and *freedom from want*. Given that after 1945, especially in the Cold War context, the international community had "tilted in favour" of freedom from fear in addressing security matters, the UNDP recovered the initial UN values and considered that both types of freedoms are essential components of human security.⁴³⁸ Thus, as defined by the UNDP in 1994, threats to human life also had to include those related to hunger, disease and repression and not only those related directly to international war or use of armed force.

Secondly, by focusing on the individual, instead of the State, the UNDP report proposed idea of human security allowed to unsettle conventions about what are considered "ordinary" and "extraordinary" threatening events, making sure that protection from sudden and hurtful disruptions in the patterns of daily life -whether in homes, in jobs or in communities- would be given due consideration.⁴³⁹ Indeed, the report explicitly highlighted the fact that "for most people, a feeling of insecurity arises more from worries about daily life than from the dread of a cataclysmic world event."⁴⁴⁰

Finally, although in a less self-conscious manner, the Report identified threats of human security stemming not only from the *disruption* of people's ordinary life but also from the *affirmation* of normalized violence and discrimination in persons' lives.

This multifaceted understanding of the notion of threats to human security accounts for the relative success of the notion among feminist scholars. Whereas classical security visions had focused on external military threats to the State, by looking at the individual, the human security concept opened the door for addressing the security concerns of both women and men equally, shedding light on the many forms of severe deprivation and violence that women encounter.

Sharing the main concern of this chapter, some feminist authors have argued that gender approaches deliver more credence and substance to a wider security concept, but also enable a theoretical conceptualization more reflective of security concerns that emanate from the 'bottom up'.⁴⁴¹

Indeed, feminist thinking has traditionally focused on the security of the individual rather than the State -defining security broadly as freeing individuals and groups, particularly women and girls,

⁴³⁸ UNDP, *Human Development Report*, 1994, p. 24, in http://hdr.undp.org/en/media/hdr_1994_en_chap2.pdf.

⁴³⁹ As was explained in Chapter I, based on this definition, the Human Development Report of 1994 grouped the threats to human security in seven categories: 1. Economic security, 2. Food security, 3. Health security, 4. Environmental security, 5. Personal security, 6. Community security, 7. Political security. UNDP, *Human Development Report*, 1994, pp. 23-25.

⁴⁴⁰ UNDP, *Human Development Report*, 1994, p. 1.

⁴⁴¹ See Hoogensen, Gunhild and Kirsti Stuvoy, "Gender, Resistance and Human Security", in *Security Dialogue*, June 2006, vol. 37, no. 2, pp. 207-228.

from the social, physical, economic, cultural and political constraints that prevent them from living an autonomous life project. Accordingly, the notion of human security was welcomed as having a clear potential to act as a driving force for critical thought regarding mainstream security concerns and the way they had systematically overlooked women and girls, allowing critical security studies to be brought in line with feminist security studies.⁴⁴²

Although failing to give a comprehensive account of violence against women and its impact in terms of human security, the 1994 UNDP Report explicitly raised the question of the many forms in which women experienced high chances of becoming victims of violence just because of their gender.⁴⁴³ Literally, “(i)n no society are women secure or treated equally to men. Personal insecurity shadows them from cradle to grave... At school, they are the last to be educated. At work, they are the last to be hired and the first to be fired. And from childhood through adulthood, they are abused because of their gender”.⁴⁴⁴ And while the Report recognized that women were making progress in the domain of education and employment, it also underlined that there still are many shocking practices contributing to women’s insecurity, including the widespread practice of genital mutilation, the custom of expecting women to be the last to eat in the household as well as that of systematically disregarding health security issues related to childbirth. In this last aspect, as the Report underlined, “a miracle of life often turns into a nightmare of death just because a society cannot spare the loose change to provide a birth attendant at the time of the greatest vulnerability and anxiety in a woman's life”.⁴⁴⁵

As it was emphasized in Chapter I, another important milestone in the coining of the idea of human security was the 2003 Report of the UN Commission on Human Security (CHS): *Human Security Now*. In the Report, State security and human security appeared as complementary, the latter trying to focus on insecurities that have traditionally not been considered as State security threats.⁴⁴⁶ Not unlike the UNDP report, the concept tried to capture the original UN spirit of viewing security comprehensively as including protection of both *freedom from fear* and *freedom from want*.⁴⁴⁷ Indeed the CHS referred to threats coming from violence, but as it was explained, also from poverty, ill health, illiteracy and other maladies, and highlighted the fact that conflict and deprivation are interconnected,⁴⁴⁸ and it underlined abrupt change as a risk to security, rather than only absolute levels of deprivation, for example, in the case of sudden economic downturns.⁴⁴⁹

This conception of human security allowed the Report to give due recognition to women’s multiple forms of threats to their basic well-being during violent conflict and its aftermath, including those with a disparate impact on some sectors of the population such as refugees and

⁴⁴² In this sense, see Florea Hudson, Natalie, *Gender, Human Security and the United Nations: Security language as a political framework for women*, Routledge, New York, 2010, p. 34.

⁴⁴³ UNDP, *Human Development Report*, 1994, p. 22.

⁴⁴⁴ *Ibid.*, p. 31.

⁴⁴⁵ *Ibidem* and p. 28.

⁴⁴⁶ *Human Security Now*, *op. cit.*, pp. 1, 4 and 10.

⁴⁴⁷ We may recall that considering the concept the Report asserts that “Human security means to protect the *vital core* of all human lives in ways that enhance human freedoms and human fulfillment. Human security means protecting fundamental freedoms—freedoms that are the essence of life. It means protecting people from *critical (severe) and pervasive (widespread) threats and situations*. It means using processes that build on people’s strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.” *Ibid.*, p. 4.

⁴⁴⁸ *Ibid.*, *Outline of the Report*, p. 1.

⁴⁴⁹ *Ibid.*, Box 1.3 “Development, rights and human security”, p. 8.

internally displaced persons. The Report made in passing reference to many forms of gender based violence including rape, sexual violence, enforced prostitution and trafficking and also raised questions related to the economic security and social protection of women, underlining the importance of land security and addressing the problem of gender disparity in education and literacy rates.⁴⁵⁰

In spite of this, the *Human Security Now* Report has been subject to criticism for failing to address violence against women specifically, as well as for not paying specific attention to women as subjects or constituency. This presumably resulted in issues that predominantly affect women, such as the complex set of questions surrounding women's bodily integrity, especially with regard to reproductive health and violence, being side-lined. For instance, whereas the Report does mention the harm to women's physical integrity due to maternal mortality and malfunctioning of systems of reproductive health,⁴⁵¹ it fails to relate this directly to general situations of violence against women or to analyse in depth the question of women's reproductive autonomy. This failure to address violence against women specifically, Charlotte Bunch has argued, allowed the connection between violence against women and other kinds of domination and insecurity in the world to be masked. The way in which a culture of violence at the domestic level furthers tolerance towards the violence of war, militarism, and other forms of domination that the human security report discusses is not given due visibility.⁴⁵²

This is why the idea of human security simply as a supplement to State security has also been problematized from a feminist perspective. It has been argued that the notion of State security, as traditionally coined (i.e. with an emphasis on military security), is not only too narrow but actually contrary to that of human security, especially if one considers the close links between gender and war and the way in which the current security system is rooted in patriarchal hierarchy. From this perspective it has been said that "the present highly militarized global system of state security is not only incompatible with human security, but represents the foremost barrier to planetary security".⁴⁵³

Similarly, Tamar Pitch has recently presented a pressing critique against the "security society" as she names it, taking some elements from Ulrich Beck's "society of risk", and highlighting the possibilities that the current global securitized system opens for a numerous amount of people to be considered threats to security and thus to live outside of the law, such as refugees and undocumented migrants, as well as the disparate impact this has on women and girls,⁴⁵⁴ two connected issues which are dealt with in the following chapters of this thesis.

While the study of VAW has helped to acknowledge the cross-points between racism and sexism, human security may also bring forward the horizontal similarities of VAW worldwide. Because it

⁴⁵⁰ *Ibid.*, pp. 23, 25, 61, 65, 77, -79, 81, 107, 114 and 122.

⁴⁵¹ See *Ibid.* Box 6.2 "Ensuring human security for women: reproductive health", p. 100.

⁴⁵² See Bunch, Charlotte, "A Feminist Human Rights Lens on Human Security," *Peace Review*. vol. 16, no. 1, 2004, pp. 29-34.

⁴⁵³ See Reardon, Betty A. and Asha Hans (editors), *The Gender Imperative. Human Security vs State Security*, Routledge, New Delhi/United Kingdom, 2010, p. 3.

⁴⁵⁴ Pitch, Tamar, *Pervasive Prevention. A Feminist Reading of the Rise of the Security Society*, Ashgate, United Kingdom, 2010, pp. 112-114. In a similar sense, see Den Boer, Monica, "Preventive empires: Security dynamics at multiple levels of governance", in *Amsterdam Law Forum*, Vol. 3, No. 3, 2011, pp. 102-113, who analyses several philosophical, legal and political concerns raised by the adoption of preventive measures in order to guarantee overall security, such as the reliability of early indicators and the upholding of the classic presumption of innocence.

contributes to breaking down the national and cultural differences and rather accentuates the shared features of the phenomenon of VAW as a form of discrimination against women –as has been recognized legally in General Recommendation No. 19 of CEDAW- it thus sets VAW against the background of broader forms of communal violence, structural violence and symbolic violence, common (in different degrees) to all societies.

Actually, the most recent *Human Security Report*, of 2012, duly highlights the shortcomings of traditional conceptions of violence, and even of violence against women as too often reduced only to sexual violence in dominant scholarship and measurement attempts. According to the Report, the dominant narrative assumes that conflict-related sexual violence is on the rise, and that rape is increasingly being deployed as a “weapon of war.” Such narrative would suggest that the experience of the small number of countries afflicted by extreme levels of sexual violence is the norm for all war-affected countries. The Report then argues that the mainstream narrative ignores domestic sexual violence in wartime, which is far more pervasive than that perpetrated by combatants -and which victimizes a far greater number of women.⁴⁵⁵

However, caution should be kept when considering this Report. As Fionnuala Ní Aoláin has signalled, the Human Security Report Project contains parts which may be considered highly provocative. She deems that the Report rightly identifies an incentive structure in conflict-afflicted societies that encourages media, NGOs and international institutions to disproportionately (in the Report’s telling) concentrate on conflict related sexual violence distorting our general understanding of sexual violence in zones of conflict. In her view, applying a critical lens to general orthodoxy in policy or scholarly endeavours, as the Report does, is to be encouraged. However, she rightly warns that little attention has been paid in most societies to appropriately and systematically documenting the scale and forms of violence experienced by women. National crime studies and statistical gathering methods evidence bias and limitation in their capture of female sexual harms. Few myths are said to exist about these pervasive and common fault-lines and they rarely capture the attention of the myth-breakers. So, there is reason to be tepid when the myth breakers turn to conflict related sexual violence and loftily pronounce the need to remedy all procedural deficiencies. She signals that it should be obvious that the short history of interest and measurement of sexual violence directed in conflict is a mere shadow to the long histories of silence over centuries, a reflection which is swiftly brushed away by the authors of the Report.⁴⁵⁶

Thus, to try to remedy some of the dominant shortcomings in considering VAW, in bringing specific women’s experiences to the fore, a gendered human security may well represent a renovating force, both as analytical framework and as a political project of emancipation, as has been duly argued by Heidi Hudson. In defending a position based on identity politics, she advocates for more fluid context-based interpretations of gender in human security, for example, through alternative feminist approaches, such as those rooted in the African context.⁴⁵⁷ As the present chapter illustrates, this would seem to echo with some of the human security concerns that have found their way into specifically African legal instruments, such as the inclusion of a ‘right to

⁴⁵⁵ See *Human Security Report 2012*, Human Security Report Project, 2012, available at http://hsrgroup.org/press-room/latest-news/latest-news-view/12-10-10/New_Report_Greatest_Source_of_Wartime_Sexual_Violence_Ignored.aspx

⁴⁵⁶ Ní Aoláin, Fionnuala, “Some caution in reading Human Security Report”, Monday 15 October 2012, Blog posted in *IntLaw Grrls. Voices on international law, policy and practice*, available at <http://www.intlawgrrls.com/2012/10/some-caution-in-reading-new-human.html#more>

⁴⁵⁷ Hudson, Heidi, “ ‘Doing’ Security As Though Humans Matter: A Feminist Perspective on Gender and the Politics of Human Security”, in *Security Dialogue*, June 2005, vol. 36, no. 2, pp. 155-174.

food security' in the 2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

It is through this expression of human security in human rights' legal provisions and judicial/quasi-judicial interpretations, and the connections between them, that this thesis wishes to concentrate on. Consequently, it reveals a series of *interpretative synergies* operating between the two concepts, human security and human rights, specifically of women and girls, and of undocumented migrants and other non-citizens, as will be argued throughout the following two chapters. As a result, it identifies limitations of this relationship and also advocates for its potentials in expanding the human rights' agenda and improving its applicability to alleviate real-life situations of extreme risk and vulnerability faced by human beings.

III.2.1 Added value of a gendered human rights-based approach to human security

The notions of human security enshrined in the UNDP 1994 Report, the 2003 CHS Report and the 2012 UNSG Report are still worth defending, especially in view of competing and narrower notions enshrined elsewhere endorsing the dichotomous approach to the "freedom from fear" or the "freedom from want" dimension of human security.⁴⁵⁸ This said, it is my understanding that the concept could be improved and surmount some of the expressed feminist criticism if it were able to duly take advantage of the way in which human rights standards and indicators can contribute in the definition and assessment of the levels of protection of human security in general, and of the human security of women in particular.⁴⁵⁹

In principle, there seems to nothing particularly surprising about this. As has been emphasized, being person-centered constructs, it is clear that both human security and human rights serve common purposes and can therefore be mutually reinforcing notions.⁴⁶⁰ However, although the CHS Report made a general reference to the relationship between human security and human rights and viewing these as a "normative framework and a conceptual reference point" for human security,⁴⁶¹ it did not endorse a human rights-based approach. In developing its findings, the

⁴⁵⁸ In particular, the idea of human security is still often limited to security as protection from violent conflict (both inter-State and increasingly also intra-State). See for instance, the *Human Security Report* issued yearly first by the University of British Columbia and later by the Simon Fraser University, both in Canada. Alternatively, as we have seen above, sometimes the emphasis is overwhelmingly placed on the protection from risks related to development aspects and socio-economic conditions. See, for instance, King, Gary and Christopher J.L. Murray, "Rethinking Human Security", *op. cit.*, 2004, pp. 586-610 (defining human security as one's expectation of years of life without experiencing the state of generalized poverty). However, as it was already highlighted, an integral approach to threats has actually been adopted in different national or regional UNDP Reports, for example the 2004 National Human Development Report on Afghanistan, *Security with a Human Face: Challenges and Responsibilities*, *op. cit.*; the *Arab Human Development Report 2009: Challenges to Human Security in Arab Countries*, *op. cit.*; and the *Human Development Report 2009/10, occupied Palestinian territory: Investing in Human Security for a Future State*, *op. cit.*

⁴⁵⁹ Interestingly enough, the need to turn to human rights indicators and profit from the extensive work already developed in this field and build upon the coordination carried out by the OHCHR, was actually highlighted more distinctly in the 2009 R2P Report of the UNSG than in the 2010 analogous Report on Human Security. The human security advocates would possibly benefit from looking at the work by their neighboring companions from the R2P world.

⁴⁶⁰ Von Tigerstrom, *op. cit.*, p. 39.

⁴⁶¹ "...human rights and the attributes stemming from human dignity constitute a normative framework and a conceptual reference point which must necessarily be applied to the construction and putting into practice of the notion of human security. In the same manner, without prejudice to considering the norms and principles of international humanitarian law as essential components for the construction of human security, we emphasize that the

Report limited itself to describing the factual situations it identified as threats, failing to incorporate a normative assessment related to the condition of enjoyment of human rights and the risks faced with regards to their protection, as well as the level of compliance of States with their human rights obligations. This is not unique. Rather, we find that in most theoretical articulations of the notion of human security, as well as in most existing exercises of human security assessment, human rights are considered, but only at the discursive level, or in their character of a general normative reference point. Few works have actually attempted to draw in any serious way the connection between human security threats and the failure to ensure human rights.

One may find some expressions in the existing human rights' normative framework of the growing awareness of the interconnection between human rights protection and human security goals, with the coining of certain new rights or the linking of traditional rights to the notion of human security. For instance the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, of 2003,⁴⁶² seems to echo human security concerns and duly underscore the relevance of general conditions for the enjoyment of rights when it sets forth, inspired partly by Security Council Resolution 1325, *a right to peace for women*, consisting of "the right to a *peaceful existence* and the right to participate in the promotion and maintenance of peace" (Article 10). Similarly, it refers to the *right to food security* of women (Article 15).

This can be understood in viewing some of the grave challenges and gross human rights violations faced by women in the African context, so much so that the promotion and protection of the human rights of women has been qualified as "a prerequisite for human security in Africa"⁴⁶³ considering that

Violence against women and girls has assumed unprecedented levels across Africa...Harmful traditional practices against women and girls such as female genital mutilation, virginity tests, early and forced marriages and widow inheritance continue to bedevil continental efforts towards gender equality and women's empowerment. The situation of women in conflict situations in Africa is deplorable. Gross human rights violations are perpetrated against civilians in general but against women and girls in particular.⁴⁶⁴

The situation of gender inequality and violence against women is not exclusive of the African continent, it is –in different levels and degrees- ongoing and pervasive in all societies, developed and developing, from the North to the South, in peace or in violent conflict.⁴⁶⁵ Indeed, none is completely exempted of gender inequality and violence against women which are in themselves human rights' violations and in turn facilitate further violations. These circumstances create different types of vulnerabilities for women and girls worldwide, and when they become

latter cannot be restricted to situations of current or past armed conflict, but rather is a generally applicable instrument". *Human Security Now*, *op. cit.*, p. 145.

⁴⁶² Adopted by the 2nd Ordinary Session of the Assembly of the Organization of the African Union in Maputo, 11 July 2003, entered into force on 25 November 2005, at http://www.achpr.org/english/_info/women_en.html).

⁴⁶³ See Ssenyonjo, Manisuli, "Human Rights of Women in Africa: A Prerequisite for Human Security", in *Protecting Human Security in Africa*, edited by Ademola Abass, Oxford University Press, 2010, taken from OXFORD SCHOLARSHIP ONLINE (www.oxfordscholarship.com).

⁴⁶⁴ Statement by the African Union Chairperson, Professor Alpha Oumar Konare in Celebration of the International Women's Day of 8 March 2007, quoted by Ssenyonjo, Manisuli, *Ibid.*, pp. 179-180.

⁴⁶⁵ In this respect, see the most recent World Bank Report, *World Development Report 2012: Gender Equality and Development*, *op. cit.*

systematic, they allow for a generalized state of human insecurity at the societal level.

Thus, it is submitted in this chapter that incorporating human rights parameters can fulfil several purposes, all of which are relevant in order to duly engender the notion of human security. Firstly, it can help in providing the notion of human security with a more precise content. Secondly, and at least to the extent that the human rights system has made progress in reflecting women's needs, it can ensure that the notion of human security is defined without leaving those threats to basic well-being that affect women and girls disparately behind. Finally, the human rights perspective helps to underscore the empowerment of citizens who in this way come to be seen not only as in need of assistance, but also and more importantly as rights holders.

In view of this, the incorporation of human rights standards to the content of human security can be particularly important for those groups who, like women, have traditionally been marginalized. From this angle, the human security aspiration becomes not only that of catering to distinctive basic needs for a broadly conceived notion of human well-being but also and primarily that of affirming citizenship by "ensuring fundamental human entitlements –social, economic, and political- in ways that expand human choices and promote human well-being and empowerment".⁴⁶⁶ For this to happen, a gendered understanding of human security requires that this notion be measured in the light of the particular violations of human rights of women and girls and the actual conditions of systemic vulnerability they face. In this task, it is argued, the application of international legal human rights standards can serve to shed light on women's experiences and needs; be a useful tool to interpret and clarify the concrete meaning of human security for the lives of women and girls and empower women and girls as citizens and rights holders.

III.2.2 Profile of a gendered human security

It was argued in Chapter I that a broad definition of human security has many advantages and that the incorporation of human right standards may partly contribute in the task of narrowing down the meaning and providing tools for the assessment of concrete situations. Both things, it is claimed, hold promise for women and girls.

In looking at Taylor Owen's proposal of a threshold-based conceptualization, it was noted how he argued that in analyzing threats and risks, this line was best seen as *political* and thus must be determined by political priority, capability and will.⁴⁶⁷ Acting in this way, he submitted, the idea of human security may work "as a threshold beyond which a wide range of issues become something similar, something requiring the unified policy response granted to security threats".

Thus interpreted, it was already argued that what the notion of human security mostly allows for is to identify situations of serious threats, which we could generically call *risk situations*. The factors that may come together in generating a risk situation may be several and can include the gravity of the violation of certain human rights; the widespread or systematic nature of a certain type of

⁴⁶⁶ Heyzer, Noeleen, "Combating Trafficking in Women and Children. A Gender and Human Rights Framework", in Truong, Thanh-Dam, Saskia Wieringa and Amrita Chhachhi (editors), *Engendering Human Security. Feminist Perspectives*, Women Unlimited, India/Zed Books Ltd., USA, 2006, p. 112.

⁴⁶⁷ Owen, Taylor, "Human Security - Conflict, Critique and Consensus: Colloquium Remarks and a Proposal for a Threshold-Based Definition", *op. cit.*, p. 384.

violations and/or the fact that the violations targets or has a disparate impact on what we could call a vulnerable population, meaning a population living in structural conditions of inequality or disadvantage, with a whole set of rights insufficiently guaranteed, and hence more susceptible to be severely affected by particular risk factors.

In the first Chapter, it was submitted that this vision of human security, which does not primarily rest on the hierarchical ordering of human rights,⁴⁶⁸ would have a bi-directional relation to the concept of human rights.

On the one hand, in order to identify risks properly and define where to draw the threshold line but also what type of State action is required, one would have to use as an indicator the levels of enjoyment of human rights and also rely on the standards of State obligations related to their protection. Reports of UN and regional human rights' mechanisms, such as those of Special Rapporteurs and treaty bodies, NGO reports, and Public Programs or Plans of Human Rights designed with the cooperation of the UN Office of the High Commissioner for Human Rights, were already mentioned as relevant sources of information to determine levels of enjoyment of human rights. The jurisprudence and interpretative work that has been carried out by human rights mechanisms and courts would also have to be taken into account under the proposed definition.

As a second and complementary method to spell out the obligations deriving from risk situations, it was considered that emphasis should be placed on the State's obligation to carry out primarily actions of *prevention*, as well as actions of *mitigation* and *attention*, against risks and vulnerabilities affecting people's overall level of security. The possibilities of human security to act as a "detonator" in triggering human rights' obligations of the State, are particularly relevant for the analysis of this chapter, especially in relation to the State's duties to take preventive measures, to address the violations of human rights that have already taken place as soon as possible and to grant reparations that redress women and girls, as well as communities, for the harm they have suffered while seeking to address the systemic shortcomings.

The identification of severe threats to persons' basic well-being and the compounded effect of the violations in situations in which they encounter multiple and structural forms of discrimination, offers in this chapter a picture which, it is suggested, captures in a richer way the harm to human rights and well-being suffered by the women and girls in the analysed cases, than the one which would be provided looking only at the different individual human rights violations as separate events affecting various individuals. This type of examination also brings to light the actions of private actors, by reinforcing State *due diligence* obligations in cases in which the State *knew or should have known* about the risk situations faced by women and girls and partly caused by the intervention of private actors.

Based on this, the text now moves to exemplify the way in which a gendered notion of human security and the human rights of women and girls can intersect and mutually reinforce each other by looking at two issues. First, the adequate conceptualization of the notion of violence against women and its due recognition as a security concern. And second, the content and interpretation of the State's obligations regarding the human rights of women and girls in the context of systemic or

⁴⁶⁸ Affirming the universality, interdependence and indivisibility of human rights, this integrated approach envisions that potentially all human rights can be at the center of human security. As it has been pointed out, the differentiating element, and the one that links the notion of human rights and human security together, is the component of risk or structural vulnerability contained in the idea of serious threats.

structural vulnerability. As we shall see, in both issues a series of *interpretative synergies* useful both for human security and for human rights concepts come to the fore.

III.3 Violence against women under international human rights law: expanding the human security agenda

It has been pointed out that the idea of human security looks at a broad range of insecurities that individuals and communities face in the context of violence, embracing a broad notion of violence which encompasses interpersonal, intergroup or international violence. Looking at gender relations through the lens of human security -rather than or in addition to a rights-based frame- may raise new questions or offer different strategic choices, some of which have recently been analysed in academic settings.⁴⁶⁹ One of these questions is the need to increase the awareness about the interrelationship between interpersonal violence and inter- or intra-state conflict, as the 2003 CHS Report rightly did.⁴⁷⁰

Also an increasing focus on the security of persons has almost inevitably contributed to shedding light on the manifold ways in which inter and intra-state armed conflict affects the lives of women and girls. There are indeed promising signs that reflect a growing awareness about the need to incorporate women's needs and views in conflict and post-conflict situations. Paradigmatic is of course Resolution 1325 issued by the UN Security Council in 2000, which focuses on the impact on women and girls in situations of armed conflict, as well as the need for gender mainstreaming in peace-keeping operations that duly address the needs and human rights of women and girls, and the importance of the participation of women in conflict resolution and peace-building.⁴⁷¹ Worth mentioning is also Resolution 1820 of the Security Council adopted in 2008, underscoring the urgent need to protect civilians, particularly women and girls, against *widespread or systematic* sexual violence in the context of armed conflict or post-conflict situations.⁴⁷² As a follow-up to resolution 1820, the UN Security Council in 2009 passed Resolution 1888 on Women, peace and security, relevant for its requirement for more detailed and *systematic reporting to detect trends* on sexual violence against women in conflict. Monitoring should encompass economic, social and cultural rights, as well as civil and political rights. Assessments related to the first type of rights may provide insight on structural factors of discrimination that have been proven to constitute powerful generators of sexual violence against women.⁴⁷³

⁴⁶⁹ See "New Perspectives on Gender and Human Security Workshop" at the University of Wisconsin–Madison, carried out on March 19 and 20, 2010, at <http://genderhumansecurity.wordpress.com/>

⁴⁷⁰ Commission of Human Security, *Human Security - Now, op. cit.*, p. 23. The Report explicitly states that "[i]n and immediately following conflict, crime rates soar. So do incidents of gender-based and sexual violence...The increases arise from the trauma of conflict and its impact on *interpersonal relations* and community networks, and from the broader issues of the breakdown of law and order...But the influence works both ways. High levels of *interpersonal violence* also appear to affect the likelihood for violent conflict. High rates of communal violence may reflect growing inequalities among communities as well as the manipulation of identity politics...Increases in gender-based and sexual violence may mark a rise in poverty and the collapse of social safety nets. And although by itself interpersonal violence will not lead to conflict, combined with other factors it leads to a widespread sense of insecurity easily manipulated along identity lines."

⁴⁷¹ *Resolution 1325*, United Nations Security Council, S/Res/1325 (2000), adopted by the Security Council at its 4213th meeting, on 31 October 2000.

⁴⁷² *Resolution 1820*, United Nations Security Council, S/Res/1820 (2008), adopted by the Security Council at its 5916th meeting, on June 19, 2008.

⁴⁷³ See in this respect OSCE, Office for Democratic Institutions and Human Rights (ODIHR), *Gender and Early Warning Systems: An Introduction*, OSCE/ODIHR, 2009, p. 10.

International civil society has also taken into account the idea of human security, specifically in promoting the right and duty for reparations to violations of women's and girls' rights in the context of armed conflict. The *Nairobi Declaration of the Right to Remedy and Reparation of Women's and Girls' Rights*, of 2007, in bearing in mind "the terrible destruction brought by armed conflict, including forced participation in armed conflict, to people's physical integrity, psychological and spiritual well-being, economic security, social status, social fabric, and the gender differentiated impact on the lives and livelihoods of women and girls", includes explicitly in its declarative point No. 6 that "national governments bear primary responsibility to provide remedy and reparation within an *environment that guarantees safety and human security*, and that the international community shares responsibility in that process".⁴⁷⁴

Similarly, in the UN setting, human security has been taken up in addressing security policy affecting women in the context of armed conflict, as a useful tool that seems to reach further than just stressing the need of a human rights based approach to security policy, and rather calls for another formulation of 'security' altogether. The UN Civil Society Advisory Group on Women, Peace, and Security (CSAG), was established in 2010 to advise the UNSG on ensuring a coherent and coordinated approach by UN agencies and entities to protecting women's rights during armed conflict and ensuring their full participation in all conflict prevention, peace-building, and post-conflict reconstruction processes. With the aim of implementing the substantial responsibilities of the international community under UNSC Resolutions 1325 and 1820 for preventing and responding to sexual violence against women displaced by armed conflict, it specifically recommended that

International and national policymakers *should fully consider issues of human security*, and in particular the potential impact of their security decisions on women, when formulating security policy. Most significantly, they should refrain from ill-advised and ineffective actions against insurgent groups if they are likely to result in massive retaliation against civilian populations, including killings, rapes, and large displacement of women and women-led households.⁴⁷⁵

⁴⁷⁴ The Declaration was issued at the International Meeting on Women's and Girls' Right to a Remedy and Reparation, held in Nairobi from 19 to 21 March 2007, by women's rights advocates and activists, as well as survivors of sexual violence in situations of conflict, from Africa, Asia, Europe, Central, North and South America, at http://www.womensrightscoalition.org/site/reparation/signature_en.php. Emphasis added. The Nairobi Declaration was actually taken into account by the African Commission on Human and Peoples' Rights in its Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence; see ACHOR/Res. 111 (XXXXII) 07.

⁴⁷⁵ International Crisis Group, "Working Paper on Preventing and Responding to Sexual Violence against Women Displaced by Conflict", by Donald Steinberg, 12 July 2010, Recommendation No. 14, available at <http://www.crisisgroup.org/en/publication-type/commentary/working-paper-on-preventing-and-responding-to-sexual-violence-against-women-displaced-by-conflict.aspx>. A gendered human security approach that duly considers human rights law and standards, as the approach suggested in this thesis, would have to integrate concrete human rights and humanitarian criteria addressing gender-based violence, if it is dealing with human security in the context of armed conflict, for example, the *Guidelines for Gender-based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies*, developed and adopted by UNHCR and OCHA. As a dialogue that seems to be taking place already, but without explicitly acknowledging it, these guidelines in turn incorporate elements of human security: targeted sector include protection, water and sanitation, *food security and nutrition* (including fuel for cooking), shelter and site planning, health and community services, and education, especially for girls. It may also serve a practical purpose to make the human security/human rights exchange more visible given that in fact "dissemination of these guidelines is incomplete and sometimes non-existent among host

Indeed, the gendered dynamics of war and peace are increasingly understood as a problem of security and a contributing factor to relapse into conflict. Nonetheless, more than a decade after the adoption of UN Security Council Resolution 1325 on Women, Peace and Security, women remain severely underrepresented in peace-building. While today there are general calls being made for the inclusion of women, women are still routinely excluded. A need remains to critically examine gender power relations that uphold the *status quo*, and investigate the process by which certain issues are put on the peace agenda and others not, and fortunately recent efforts are being carried out in this domain, notably under the logo ‘Equal Power-Lasting Peace’.⁴⁷⁶

Without doubt, armed conflict has a huge impact on women and girls, and provides the scenario of widespread gender-based violence, particularly rape and other forms of sexual abuse.⁴⁷⁷ However, as it has been emphasized in this research, there are various forms of pervasive violence against women that also occur in contexts of “peace” (viewed under the State-centered logic), and that may be the result of a continuum of gender-based violence involving structural discrimination and the violation of a wide set of interrelated human rights. In this respect, one may think of domestic violence for example, or human trafficking of women and the way they experience (in)security in such settings,⁴⁷⁸ the violence arising from extreme poverty in itself and in the different forms of violence it facilitates, especially if one takes into account the millions of avoidable deaths every year that derive from sources not directly related to armed force.⁴⁷⁹

Nevertheless, in their conceptualizations of “violent conflict” and “violence”, the mainstream ideas and measuring exercises of human security adopt a restricted view confined to the utilization of armed force by the State or by any other actor(s) in the context of contended issues.⁴⁸⁰ In other

governments, NGOs, peacekeeping forces, displaced women themselves and even implementing UN agencies”, as noted in the same working paper, p. 12.

⁴⁷⁶ *Equal Power-Lasting Peace. Obstacles for women’s participation in peace processes*, The Kvinna till Kvinna Foundation, Sweden, 2012.

⁴⁷⁷ Resolution 1325, United Nations Security Council, *op. cit.*, O.P. 10.

⁴⁷⁸ Coomaraswamy, Radihka, “Human Security and Gender Violence”, in *Economic and Political Weekly*, Vol. 40, No. 44/45 (Oct. 29 - Nov. 4, 2005), pp. 4729-4736. The article also emphasizes the successful strategies in this field in South Asia achieved through women’s groups-government partnerships. See also Chuang, Janie, “Beyond a Snapshot: Preventing Human Trafficking in the Global Economy”, 13 *Indiana Journal of Global Legal Studies* 137, 2006, pp. 140-147, who identifies how conditions of vulnerability and push-pull factors in migratory patterns function in the trafficking arena.

⁴⁷⁹ In this line, see for example Roberts, David, *Global Governance and Biopolitics: Regulating Human Security*, *op. cit.*, pp. 13 and 16. Some efforts of a more integral character are being made in the field of public policy and program design proposals, for example, at the EU level, to incorporate and mainstream gender into Security Risk Management; see Persaud, Christine and Hye Jin Zumkehr (editor), *Gender and Security: Guidelines for Mainstreaming Gender in Security Risk Management*, Briefing Paper, European Interagency Security Forum, 2012. The study is directed to include an effective and coherent gender perspective both in humanitarian and development assistance, and targeting the women and men provided with such assistance, but also the staff of agencies and NGO’s involved in the field.

⁴⁸⁰ See Commission on Human Security, *Human Security Now*, Commission on Human Security, New York, 2003, in particular Chapters 2 “People caught up in violent conflict” and 4 “Recovering from violent conflict”, Box 2.1 “Conflict data are state-centred, not people-centred” at p. 22, which also highlights that estimates of the number of people killed as a result of violent conflict usually reflect only battle-related deaths: From 1945 to 2000 more than 50 million people are estimated to have died in wars and conflicts. But many more die from the consequences of conflict—from the destruction of infrastructure, the collapse of essential health services and the lack of food. However, those data are not available or included. See also Box 2.2 “Conflict and interpersonal violence” at p. 23 and Table 4.1 “Key human security clusters following violent conflict” at p. 60; as well as documents published by the Human Security Report Project: *Human Security Report 2005. War and Peace in the 21st Century*, Human Security Centre, University of British Columbia, Canada, Oxford University Press, 2005; *Human Security Brief 2006*, Human

words, those who focus on “the freedom from fear”, limit themselves to violence expressed in inter- or intra-state violence, and those who also place an emphasis on “freedom from want” threats which do not necessarily involve armed force and often rightly highlight gender variables as important to orient analysis, do not consider that certain forms of extreme and structural deprivations may amount to violence.

In doing so, it is argued, the dominant concepts of human security do not sufficiently take into account the evolution of the concept of violence against women under human rights law, an evolution which has gradually broadened it to include many forms of harm, including of physical, psychological or sexual, but also of economic nature, both in the public and the private realms,⁴⁸¹ both during times of peace and armed conflict,⁴⁸² and as a form of discrimination.⁴⁸³

Indeed, conceptualizing VAW as a form of discrimination was a major step towards viewing it as a human rights violation and more broadly as a breach to equality. This outlook advanced in General Recommendation No. 19 of CEDAW, of 1992, was based on the Committee’s consideration of VAW as “acts that inflict physical, mental or sexual harm or suffering, *threats of such acts*, coercion and other deprivations of liberty” and its conclusion that such violence constitutes a form of discrimination against women within Article 1 of the relevant Convention, which actually deals with the “Elimination of Discrimination Against Women”, and not directly with VAW.⁴⁸⁴ Although the Convention itself does not present VAW as a form of discrimination, as Christine Chinkin has noted, through providing this interpretation, CEDAW creatively placed VAW within the realm of human rights, opening the door for its consideration as a State obligation. In an important realisation in *human security* terms, she highlights how this “rights-based approach recognizes that women are entitled to be free from violence and the *fear of violence*, and that State parties have a legal obligation to ensure this right.”⁴⁸⁵

Mentioning for the first time economic injury as a form of gender violence, Article 1 of the 2003 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa also defines violence against women and spells out corresponding State obligations, as “all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and

Security Centre, University of British Columbia, Canada, both of which refer to violent conflict, whether stemming from criminal or from political violence, as one that uses armed force; and *Miniatlas on Human Security 2008*, Simon Fraser University-School for International Studies, The World Bank-Human Security Research Group, Notes on Terminology, p. 66, that specifically equates “violent conflict” to “armed conflict”, which is defined as “political violence between two parties involving armed force, and causing at least 25 reported battle-deaths a year”.

⁴⁸¹ See art. 1 of the UN 1993 *Declaration on the Elimination of Violence Against Women* (UN General Assembly, A/RES/48/104); arts. 1 and 3 of the 1994 Inter-American Convention of Belém do Pará and, most recently, art. 1 of the 2003 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa.

⁴⁸² See art. 1 of the 2003 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa.

⁴⁸³ See, for instance, General Recommendation No. 19 of the Committee for the Elimination of Discrimination Against Women, 1992 (11th session, 1992), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>; and art. 6 of the 1994 Inter-American Convention of Belém do Pará.

⁴⁸⁴ UN CEDAW, General Recommendation No. 19 of the Committee for the Elimination of Discrimination Against Women, 1992 (11th session, 1992), paras. 6 and 7, available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>

⁴⁸⁵ Chinkin, Christine, “Violence Against Women”, in Freeman, Marsha, E., Christine Chinkin and Beate Rudolf (editors), *The UN Convention on the Elimination of all Forms of Discrimination Against Women: A Commentary*, Oxford University Press, 2012, p. 451. See the fascinating historical and analytical account the author provides of the development of this General Recommendation.

economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war”.

It is also not a coincidence that inter-governmental bodies such as the OSCE, committed precisely to security and adopting a broad understanding of the idea, have recently emphasized the link between non-discrimination and gender equality in the socio-economic realm as a means of prevention of VAW. The OSCE calls Member States “to take measures to strengthen the *economic independence of women*, including ensuring *non-discriminatory* employment policies and practices, providing *equal access* to education and training, *equal remuneration* for equal work, *increased* work and educational opportunities, equal access to and control over economic resources with a view to *reducing women’s vulnerability to all forms of violence*, including domestic violence and trafficking in human beings”.⁴⁸⁶

Against this setting, the convergences between the Human Security debate and that of Women, Peace and Security have been analysed from a feminist perspective. At this crossroads the gendered forms of insecurity in women’s and girls’ lives, the broader contexts of gender inequality and discrimination, and the structural patterns of indirect violence that facilitate them are revealed. Such an analysis renders evident the need for a mutually reinforcing perspective that duly incorporates women and their views as a part of integral peace-building processes, as well as for these processes to tackle the structural violence at the root cause of women’s human insecurity.⁴⁸⁷

Similarly, in more “normalized” or “peaceful” settings, the centrality of caring values and care functions for the sustainment of life has been analysed by feminist authors in relation to human security against the background of the gendered political economy of contemporary globalisation. In this respect, it has been argued that a critical, feminist ethics of care can provide a comprehensive ontological and normative framework for integrating economic exclusion with violence, and thus for conceptualising human security in a way that is sensitive to the role played by gender identities and other types of power relations.⁴⁸⁸

On specifically legal conceptualizations of violence against women, promoting an integral view on its understanding, recently in 2011 the Council of Europe adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence (notably under the human security-related logo *safe from fear, safe from violence*).⁴⁸⁹ Distinctly, and linked to the issue dealt

⁴⁸⁶ OSCE Ministerial Council Decision No. 15/05 Preventing and Combating Violence Against Women, MC.DEC/15/05, 6 December 2005, O.P. 6. Emphasis added.

⁴⁸⁷ See McKay, Susan, “Women, Human Security, and Peace-building: A Feminist Analysis”, Chapter 7, in IPSHU English Research Report Series No.19 *Conflict and Human Security: A Search for New Approaches of Peace-building*, 2004, pp. 152-175; see especially Table 1: Women’s and Girls’ Human Security During and After Armed Conflicts: Indirect and Direct Violence/ Unorganized and Organized Threat, at p. 160.

⁴⁸⁸ Robinson, Fiona, “The Importance of Care in the Theory and Practice of Human Security”, in *Journal of International Political Theory*, Volume 4, No. 2, 2008, pp. 167-188. It must be pointed out, though, that the author argues that a human rights-based approach to human security does not sufficiently take into account the relevance of relations of care, caring values and care activities for the maintenance of long-term human security. On this subject, see also the fascinating work by Fiona Williams, “Towards a Transnational Analysis of the Political Economy of Care”, SULCIS Working Papers, Stockholm University Linnaeus Center for Integration Studies – SULCIS / Scandinavian Working Papers on Economics, WP No 2011:6, 9 August 2011, highly relevant for the work of female migrant domestic workers, particularly undocumented ones, as dealt with in Chapter IV of this thesis.

⁴⁸⁹ Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted by the Committee of Ministers of the Council of Europe on 7 April, 2011 and opened for signature in Istanbul, Turkey, on

with in Chapter IV of this thesis on undocumented migrants, the Convention singles out ‘migrant women’ as a group in a specific state of vulnerability, in line with previous highlights of such risks by other institutions at the European level,⁴⁹⁰ under the consideration that “migrant women, with or without documents, and women asylum-seekers are *particularly vulnerable* to gender-based violence. Although their reasons for leaving their country vary, as does their legal status, both groups are at *increased risk of violence* and face similar difficulties in overcoming it. For this reason, the convention prohibits *discrimination* on the grounds of *migrant or refugee status* when it comes to implementing its provisions (article 4.3). It also requires that measures be taken to *prevent* such violence and *support victims* while taking into account the needs of vulnerable persons”.⁴⁹¹ The Convention also presents innovative features in the field of human rights and public policies, outlined in this thesis as a potential avenue for addressing widespread vulnerabilities. Precisely because this is often the nature of VAW, apart from including the State obligation to adopt gender-sensitive policies “of equality between women and men and the empowerment of women” (article 6), it also includes a whole Chapter on the obligation of States to adopt “Integrated policies and data collection” to prevent and combat violence against women. Fortunately, other recent human rights instances have taken up the interrelation between the right to non-discrimination and the enjoyment of other human rights by women⁴⁹²:

Although some national legal systems are starting to reflect in their internal legislation the broadly conceived notion of violence against women⁴⁹³ we are still far from a sufficiently well asserted notion of human security which includes the right to live free from all forms of violence.

III.4. Human security and VAW: synergies reinforcing human rights of women and girls

May 11, 2011. The Convention will enter into force once 10 countries have ratified it, and 8 out of the 10 ratifications have to come from Council of Europe member states. At the time of writing, the Convention has been signed by 24 States, but signed and ratified only by three: Turkey, Poland and Portugal, and thus, is not yet in force; a situation which has prompted the Parliamentary Assembly of the Council of Europe to adopt a resolution promoting ratification by States and the consequent ‘speed-up’ of entry into force. See PACE, Resolution 1861, “Promoting the Council of Europe Convention on preventing and combating violence against women and domestic violence” (provisional edition), 2012, available at <http://assembly.coe.int/main.asp?link=http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta12/ERES1861.htm>

⁴⁹⁰ For instance, OSCE Ministerial Council Decision No. 15/05 Preventing and Combating Violence Against Women, MC.DEC/15/05, 6 December 2005, preambular para. 6, expresses concern over the “particular targeting or vulnerability to violence” of migrant women, among other groups.

⁴⁹¹ See http://www.coe.int/t/dghl/standardsetting/convention-violence/themes_migrant_women_en.asp

⁴⁹² See UN Committee Against Torture, General Comment No. 3, *Implementation of article 14 by States parties*, CAT/C/GC/3, 19 November 2012, paras. 32-34.

⁴⁹³ The concepts of “psychological violence”, “economic violence” and “institutional violence” are taken into account by the Mexican General Law for the Access of Women to a Life Free of Violence, at the federal level (and similar laws at the state level), as types of violence it protects women against; *Ley General de Acceso de las Mujeres a una Vida Libre de Violencia*, published in *Diario Oficial de la Federación*, 1 February 2007, last reform published 20 January 2009. Other countries have also adopted positive changes, although challenges remain. For example, in the case of Belgium, according to a recent HRW report, women, including migrant women, continue to face challenges in protecting themselves and their children from domestic violence. In particular, there are gaps in the emergency protection framework to protect women at *imminent risk*. These relate particularly to restraining and exclusion orders. Under the current law survivors of “economic, verbal, and psychological violence” cannot apply for a civil order to exclude the partner from the home. Unmarried women who cohabit with a partner but have not signed a formal cohabitation agreement are also ineligible for protection under the law; see HRW, *The Law was Against Me’: Migrant Women’s Access to Protection for Family Violence in Belgium*, 2012.

In recent years, international human rights law has progressed significantly and has moved to affirm positive obligations of the State under the *due diligence standard*, now considered by some as ‘emerging international customary law’,⁴⁹⁴ including in matters which were traditionally considered part of the private domain, such as domestic violence, in particular, against women and girls. Already since the World Plan of Action adopted by the Conference of the International Women’s Year held in Mexico City in 1975, the need to address harms to the physical integrity of women was signalled and the “Declaration of Mexico on the Equality of Women and their Contribution to Development and Peace”, was adopted in 1975.⁴⁹⁵ The UN treaty on the subject of discrimination against women, CEDAW, was adopted in 1979 and came into force in 1981. The CEDAW Committee, treaty body in charge of monitoring state compliance and interpreting the convention, adopted in 1992 its paradigmatic General Recommendation No. 19 on VAW and in 1993 the UN Declaration on the Elimination of Violence Against Women was adopted, as referred to above. To start off with and illustrative example of the practical application of this understanding, in *A.T. v. Hungary*, the UN Committee of CEDAW in 2005 dealt with the case of a battered woman by her husband who was not prosecuted by the State. The Committee held that even though the damage to her right to physical integrity was done by a private party, the State knew and did not act with *due diligence*, whereby it was held responsible. These recent developments in human rights law have contributed to adequately conceptualize violence against women and girls as a State problem and a security concern.⁴⁹⁶

Much has been achieved since the adoption of the 1993 Vienna Declaration and Program of Action, cited above, and by the famous 1995 Beijing Declaration and Program of Action,⁴⁹⁷ which both stressed the need to combat violence against women; Beijing actually pre-dated not only by the adoption of the 1993 UN Declaration on the Elimination of Violence Against Women in the universal arena, as described above, but also by the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) at the regional level. International Criminal Law has also advanced a great deal in the legal understanding of some of the most brutal forms of sexual violence affecting mainly –and in some

⁴⁹⁴ In this sense see the conclusion of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, in her report of 2006, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women. The Due Diligence Standard as a Tool for the Elimination of Violence Against Women* (para. 29), January 20, 2006, report prepared by Yakin Ertürk in accordance with Commission on Human Rights Resolution 2005/41; and Hasselbacher, Lee, “State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection”, *Northwestern University Journal of International Human Rights*, Volume 8, Issue 2 (Spring 2010), pp. 190-215, who analyses this standard as “emerging” international customary law, pp. 198-200, available at <http://www.law.northwestern.edu/journals/jihr/v8/n2/3> The binding character of due diligence has been recognized by inter-governmental bodies such as the OSCE who reaffirms “that States have an *obligation* to exercise *due diligence* to prevent, investigate and punish the perpetrators of violence against women and girls and to provide protection to the victims, and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms”; OSCE Ministerial Council Decision No. 15/05 Preventing and Combating Violence Against Women, MC.DEC/15/05, 6 December 2005, preambular para. 3. Emphasis added.

⁴⁹⁵ See the history analysed in Chinkin, Christine, “Violence Against Women”, in Freeman, Marsha, E., Christine Chinkin and Beate Rudolf (editors), *The UN Convention on the Elimination of all Forms of Discrimination Against Women: A Commentary*, *op. cit.*, p. 444.

⁴⁹⁶ See Boerefijn, Ineke and Eva Naezer, “Emerging Human Rights Obligations for Non-State Actors”, in *Due Diligence and its Application to Protect Women from Violence*, edited by Carin Benninger-Budel, Martinus Nijhoff Publishers, The Netherlands, 2008, pp. 91-108; as well as Von Tigerstrom, *op. cit.*, p. 60.

⁴⁹⁷ Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women: Action for Equality, Development and Peace, 15 September 1995, available at <http://www1.umn.edu/humanrts/instree/e5dplw.htm>

cases exclusively- women and girls, notably through the categorization as a crime against humanity of rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization in the 1998 Rome Statute of the International Criminal Court.⁴⁹⁸

As will be examined, both the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECHR) have concluded that, in terms of International Human Rights Law, based on the due diligence standard States have an obligation to *prevent* this type of violence and to *take measures* in order to protect women facing situations of violence.⁴⁹⁹

Indeed, both regional Courts have applied the *due diligence standards* in cases concerning violence against women, be it domestic violence or broader forms of societal violence such as femicide. Such *due diligence standards* developed since the late 1980's mainly under Inter-American human rights law as a general criterion to evaluate State responsibility. These standards express the appropriate level of care and prevention measures that the State should take in order to protect and guarantee people's human rights from non-State actors, including the duty to investigate and punish such violations by non-state actors and properly redress the victims.⁵⁰⁰ Through applying the due diligence standards to cases of violence against women, the Courts have duly fleshed out the structural dimensions of the problem, and adjusted state obligations to reflect the situations of risk that women encounter, endorsing thereby what this text identifies as a "human security-sensitive approach" to the interpretation of women's and girls' human rights.

The due diligence obligation of states has also recently been reaffirmed by CEDAW in 2010 in its General Recommendation No. 28, *The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, which provides

⁴⁹⁸ See article 7.1.g) of the Rome Statute of the International Criminal Court, adopted on July 17, 1998 and entered into force on July 1, 2002. These legal categorizations of certain forms of gender-based violence as crimes against humanity or war crimes had also been advanced by the jurisprudence of the two *ad hoc* International Criminal Tribunals for Ex-Yugoslavia and for Rwanda, and have been further developed by both tribunals and by the case-law of the ICC itself; see Fries, Lorena, "La Corte Penal Internacional y los avances en materia de justicia de género: una mirada retrospectiva", in Birgin, Haydée and Natalia Gherardi (coordinators), *Reflexiones jurídicas desde la perspectiva de género*, Colección "Género, Derecho y Justicia" No. 7, Suprema Corte de Justicia de la Nación, México, 2010, pp. 211-238.

⁴⁹⁹ Apart from the two cases of *Opuz v. Turkey* (ECHR) and *Cotton Field v. Mexico* (IACHR), which will be analysed in this text and which reaffirm those obligations, see the detailed analysis of the *obligation of prevention* carried out in the Concurring Opinion of Judge Diego García-Sayán in relation to the Judgment of the Inter-American Court of Human Rights in the *Case of González et al. ("Cotton Field") v. Mexico*, of November 16, 2009, as well as the study of the international obligation of due diligence presented in Hasselbacher, Lee, *op. cit.*

⁵⁰⁰ See the seminal *Case of Velásquez Rodríguez v. Honduras* by the Inter-American Court of Human Rights, (Ser. C) No. 4, 172, Judgment of July 29, 1988, in which the Court dealt with an enforced disappearance alleged to have been carried out by official authorities. Under the argument that a widespread practice of enforced disappearances existed in Honduras at the time, and this could be adequately proved, the Court constructed an obligation of due diligence of the State and concluded there actually was enough evidence to derive international State responsibility for the violation of the right to liberty and personal security. Years before the existence both of the Inter-American and the UN treaties on the subject of enforced disappearances -actually promoted at the UN level by Latin American countries following the regional legal development on the subject- the IACHR formulated such principle of due diligence in terms of the obligation of the State to prevent such occurrences and guarantee in a reasonable measure the enjoyment of the rights of the American Convention to all persons under its jurisdiction (article 1.1); see para. 169. It took this principle one step further than only looking at conducts by official authorities and was clear in concluding that "An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a *private person* or because the person responsible *has not been identified*) can lead to international responsibility of the State, not because of the act itself, but because of the *lack of due diligence to prevent* the violation or to *respond* to it as required by the Convention; para. 172 (emphasis added); see also paras. 173-175.

ways for States parties to implement domestically the substantive provisions of the Convention. CEDAW specifically clarifies that Article 2 “also imposes a *due diligence obligation* on States parties to *prevent discrimination* by *private* actors. In some cases, a private actor’s acts or *omission of acts* may be attributed to the state under international law. Consequently, CEDAW emphasizes that states parties are obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention.”⁵⁰¹

At the same time, reflection may also come up concerning this point when viewed under the more general existing standards of state responsibility in international law that would probably not allow for such a flexible or perhaps ambitious interpretation like CEDAW’s in considering that *omissions* by private parties could amount to state responsibility.⁵⁰² The *Draft Articles on Responsibility of States for Internationally Wrongful Acts* adopted in 2001 by the International Law Commission (ILC) indeed indicate that there is an internationally wrongful act when a conduct consisting of an *action* or *omission* meets two conditions: that it is attributable to the State under international law; and that it constitutes a breach of an international obligation of the State (article 2.a. and b.). In its characterization of conducts that can be attributed to the State, the Draft Articles do not leave much space for evaluating private action, by including basically State organs, persons or entities exercising governmental authority, or persons or groups “in fact acting on the *instructions* of, or under the *direction* or *control* of, [the] State in carrying out the conduct” (articles 3-10). This formulation requiring explicit State approval makes it virtually impossible to construct state responsibility arising from omissions by private actors when this explicit expression is not in place, a frequent situation when dealing with VAW. A plausible alternative construction in line with the Draft Articles could be that a state is responsible under international law for its own omissions, as well as when a situation amounting to discrimination results from the action or inaction of private parties.

However, it seems that the phrasing of CEDAW’s interpretation in General Recommendation No. 28 is opening the possibility of concluding state responsibility for omission of private parties “in some cases”, which could be defined and refined further according to criteria and the recent case-law in this subject, as analysed in this chapter. Apart from the state responsibility deriving from the conduct of private parties concerning VAW as examined in this chapter, one could in fact think of other practical examples of the conditions foreseen by CEDAW: if there were an individual or social pattern of repeatedly not paying a woman/women for their domestic work in private households (conduct of *omission*) and the state had been advised of this situation or had elements to realize this was occurring (*knew or ought to have known*) and did not take action, then this could translate into state responsibility for not having a regulatory inspection system in place⁵⁰³ or

⁵⁰¹ General Recommendation No. 28, *The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, 16 December 2010, para. 13.

⁵⁰² See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10, UN General Assembly A/56/10, November 2001. On a general discussion on the content of the Draft Articles, their status within international law and their impact in legal practice, see Crawford, James, “The ILC’s Articles On Responsibility Of States For Internationally Wrongful Acts: A Retrospect”, in *American Journal of International Law*, Vol. 96, pp. 874-890.

⁵⁰³ For instance, in the field of ESC Rights closely touched by private party action, the European Committee of Social Rights was critical towards Portugal’s low number of inspectors dedicated to supervision of employers in guaranteeing implementation of the prohibition of child labour, as not taking all necessary steps to comply with its obligations under the European Social Charter; ECSR, *ICJ v. Portugal*, Complaint No.1/1998. See also Langford, Malcolm, “Judging resource availability”, in Squires, John, Malcolm Langford and Bret Thiele (editors), *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, Australian Human Rights

for not having carried out adequate supervision in knowledge of the specific circumstances, thus, breaching its international obligations (to allude to the second element of the ILC's definition) of *prevention* for such harm to keep on happening, and of *protection* of the already affected woman/women, as articulated more clearly by recent case-law and normative standards, as reviewed in this Chapter. This position would seem to be confirmed by the recent ILO Convention Concerning Decent Work for Domestic Workers, of 2011, which lays down a state duty to protect domestic workers (many of them women) from abusive practices, including those carried out by *private employers* (articles 8 and 15), as reviewed below in this text.

The acknowledgment of the impact of private actors on human rights has also increased in recent years and international state responsibility has been adjudicated in case law and debated by scholarship, as discussed throughout this chapter. Examples may be found as well in state responsibility for enforced disappearances by private (or undetermined) parties, recognised by the IACHR since the late 1980's in *Velásquez Rodríguez v. Honduras*, as referred to above, and now included since 2006 as a defined treaty obligation in the UN convention on the subject. The International Convention for the Protection of All Persons from Enforced Disappearance moves beyond *a priori* state authorization, instructions, direction or control, as required by the non-binding Draft Articles, and foresees that a state may be responsible for enforced disappearances carried out "by persons or groups of persons acting with the authorization, support *or acquiescence* of the State", followed by a refusal to acknowledge such disappearance (article 2).⁵⁰⁴ In opening the door for international responsibility by reason of state acceptance or compliance and not explicit approval, the Convention has adopted a more protective person-centered stance. At the same time, it constitutes an international legal instrument that holds an acceptable record of consensus considering it only entered into force in 2010.⁵⁰⁵

Ongoing debates on transnational corporations and human rights, on the responsibility of private military companies under international humanitarian and human rights law, and on the human rights responsibility of non-state actors more generally, have taken the stage in recent years and demonstrate that the position of private parties in relation to international law, and the links between private conduct (by action or omission) and international state responsibility, are a contested area open for reflection.

In this context, let us also recall the enormous struggle to gain recognition of 'private' violence against women as a human rights and a state concern, and the protection from it as a legally binding state obligation, as has been recounted in detail by feminist authors.⁵⁰⁶ Keeping that in mind and tackling a field in constant evolution as discussed above, the 2001 Draft Articles, would

Centre/The University of New South Wales in collaboration with Centre on Housing Rights and Evictions, Australia, 2005, pp. 89-110.

⁵⁰⁴ International Convention for the Protection of All Persons from Enforced Disappearance, UNGA A/61/488, adopted on 20 December 2006 in New York and entered into force on 23 December 2010.

⁵⁰⁵ Adopted six years ago and entered into force only two years ago, the Convention has been signed by 95 states and ratified by 37 states, at the time of writing; see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en#EndDecv

⁵⁰⁶ See the account given by Hilary Charlesworth and Christine Chinkin using the example of VAW to discuss the difficulty of opening traditional and orthodox views concerning the (valid) sources of international law, in *The Boundaries of International Law. A Feminist Analysis*, Juris Publishing, Manchester University Press, 2000, pp. 70-79. See also a feminist critique of the previous Draft Articles of 1979-1980 in which the ILC similarly did not widen imputability or state responsibility to cover state compliance with maintaining in place social and legal systems that allowed for endemic violations of physical and mental integrity such as VAW, in Charlesworth, Hilary, Christine Chinkin and Shelley Wright, *Feminist Approaches to International Law*, *op. cit.*, at p. 629.

need to be updated and complemented with more gendered and protective interpretations that adequately promote and ensure women's human rights, as the ones developed recently by regional and UN human rights mechanisms. The field concerning the degree and scope of state responsibility regarding private party actions and omissions as related to women is open for discussion. Indeed, the UN Special Rapporteur on VAW has actually requested submissions from states and relevant stakeholders concerning the *due diligence obligation*, and will dedicate her report of 2013 to this subject, creating a path for meaningful debate for the future of human security and human rights of women and girls.

In any case, understanding that VAW is a form of *discrimination* against women, as explained above, the due diligence standard recognized by CEDAW's General Recommendation No. 28 is a particularly relevant obligation for the cases involving violence by private actors as reviewed in the present section.

Indeed, VAW as a form of discrimination is also addressed by General Recommendation No. 28 in clarifying as well that "Gender-based violence may breach specific provisions of the Convention, *regardless of whether those provisions expressly mention violence*", an illuminating realisation when thinking of structural forms of discrimination against women, such as those related to socio-economic factors as developed in this thesis. CEDAW further underlines that "States parties have a *due diligence obligation* to prevent, investigate, prosecute and punish such acts of gender-based violence",⁵⁰⁷ which may then also include structural forms of institutional violence or economic harm, as confirmed as well in the Maputo Protocol on Women in Africa of the ACHPR, described above.

Thus, the text first explores the human security-sensitive approach referred in this thesis through an in-depth analysis of two recent decisions, one from each regional Court, and then spells out the doctrinal implications of this evolution.

III.4.1 ECHR and domestic violence

The ECHR decided *Opuz v. Turkey* in 2009 building on some of its previous decisions notably that of *Bevacqua and S. v. Bulgaria* decided in 2008. In this last case, the applicant Valentina Nickolaeva Bevacqua, argued that Bulgarian government officials had violated her right to respect for private and family life as guaranteed by Article 8 of the European Convention by failing to take the necessary measures to provide an adequate legal framework that would protect her and her young son from the violent behaviour of her former husband, a view which was upheld by the Court.⁵⁰⁸ It is also worth mentioning the two cases of *Kontrovà v. Slovakia* and *Branko Tomašić and Others v. Croatia*, that together with *Bevacqua* form a triad of cases concerning domestic violence against women and their children, met by the State's lack of due diligence.⁵⁰⁹

The Court had also shown a human security-sensitive approach in previous cases involving violence against women, specifically in the expression of sexual violence. To give but an example,

⁵⁰⁷ *Ibid.*, para. 19.

⁵⁰⁸ See ECHR, *Case of Bevacqua and S. v. Bulgaria*, App. No. 71127/01, June 12, 2008.

⁵⁰⁹ *Kontrovà v. Slovakia*, Application no. 7510/4, Judgement of 31 May, 2007; and *Branko Tomašić and Others v. Croatia*, Application no. 46598/06, Judgement of 15 January, 2009.

in *M.C. v Bulgaria*, of 2003,⁵¹⁰ the ECHR reviewed not only the situation of a 14-year old raped girl in Bulgaria, but placed the lack of adequate criminal investigation on the part of the Bulgarian authorities against the background of a broader *law and practice* in the field of rape criminalisation and its relation to VAW. Through giving weight to the subjective element of human security in the need to consider “the manner in which rape is experienced by the victim”, as well as the “particular vulnerability of young persons”, and reaffirming the need for a “context-specific assessment” of such cases, the Court analysed a wide array of sources, from comparative law at the European level, General Recommendation 19 of CEDAW on VAW, evidence provided by NGOs (Interights), to the jurisprudence of the International Criminal Tribunal for ex-Yugoslavia.⁵¹¹ This coordinated and interconnected approach to the analysis of human rights violations runs hand in hand with the focus and working methodology proposed by the human security idea.

In the case under analysis of *Opuz v. Turkey* involving domestic violence,⁵¹² -possibly less clear-cut than cases involving sexual violence-, the applicant Nahide Opuz, had been subjected by her husband over a period of years to different forms of physical and psychological mistreatment including death threats. The death threats had also been directed against her mother who has eventually shot dead by him. For years the facts had been brought to the attention of State officials, but with no significant effect on the protection of Opuz and her mother. After the death of the applicant’s mother the actions were not duly persecuted and punished by the criminal justice system of the State.

The European Court of Human Rights held the State responsible for failing to exercise due diligence to adequately protect women from domestic violence spelling out some of the practical obligations that such protection requires. In particular, the ECHR highlighted the need for enforceable measures of protection and a legislative framework that enables criminal prosecutions of domestic violence in the public interest, rendering the withdrawal of charges by the private party irrelevant in the worst cases. More concretely, looking at events, not as isolated incidents but as part of a pattern amounting to a situation of risk (in view both of the recurrent events concerning the specific victims but also the generalized impunity around violence against women in the region where the victims lived), the Court recognized that a State’s failure to exercise due diligence to protect women against domestic violence, when it “*knows or ought to have known of the situation*”,⁵¹³ breached its positive obligation of taking “*preventive operational measures*”.⁵¹⁴

Thus, although the acts of violence had been carried out by a non-State actor, the applicant’s

⁵¹⁰ ECHR, *Case of M.C. v Bulgaria*, App. No. 39272/98, 4 December 2003 (Final 4 March 2004).

⁵¹¹ Framing its analysis in this interrelated examination, the Court reached the conclusion that “any *rigid approach* to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the *effective protection* of the individual’s sexual autonomy. In accordance with contemporary standards and trends in that area, the member States’ *positive obligations* under Articles 3 [right to personal integrity/freedom from torture and ill-treatment] and 8 of the Convention [right to private life] must be seen as requiring the *penalisation and effective prosecution* of any non-consensual sexual act, including in the absence of physical resistance by the victim”, *Ibid.*, para. 166; see also paras. 108, 126 and 164, 162, 163, 165, 171, 177 and 183. Emphasis added.

⁵¹² ECHR, *Case of Opuz v. Turkey*, App. No. 33401/02, June 9, 2009.

⁵¹³ *Ibid.*, see para. 130. Emphasis added. The condition for the State to *know or ought to know* of a certain risk or threat as a parameter for international legal responsibility has also been used in other decisions by human rights bodies, for example, that of *Delgado Páez v Colombia* by the UN Human Rights Committee referred to in section II.2.2 above.

⁵¹⁴ *Case of Opuz v. Turkey*, *op. cit.*, see para. 148. Emphasis added.

husband, the Court found a State violation of the right to life of the applicant's mother and the right to physical and moral integrity of the applicant.⁵¹⁵ Tellingly, the decision relied also on CEDAW, the Inter-American Convention Belém do Pará, and reports from non-governmental organizations, to examine and characterize the situation of violence against women, including domestic violence, in Turkey.⁵¹⁶ In fact, based on the facts of the individual case and the analysed general context of discrimination against women, the ECHR concluded that the failure to exercise due diligence amounted to gender-based discrimination, violating women's right to non-discrimination and equal protection of the law (art. 14), in this case, in relation to the right to life (art. 2) and the right to physical and moral integrity (art.3) of the Convention.⁵¹⁷ For the first time, the Court concluded on a *State* violation of the right to non-discrimination in a case of *domestic* violence.

This basic doctrine on State responsibility for violence against women by non-State actors has also been confirmed by later cases of the ECHR, such as *E.S. and Others v. Slovakia* of 2009; *Rantsev v. Cyprus and Russia* of 2010; *A. v. Croatia* of 2010 and *Hajudova v. Slovakia* also of 2010.⁵¹⁸ Unfortunately, the 'Opuz line' was left aside in the recent judgment of *A.A. and Others v. Sweden*,⁵¹⁹ involving VAW in the case of women from Yemen seeking asylum in Sweden, possibly giving leeway to the recent trend of increasingly restrictive immigration policy in Europe which often leaves vulnerable persons without due protection.

III.4.2 IACHR and femicide

Turning to a different regional context, another good example of legal analysis drawing connections between the 'building-blocks' of human security and human rights is provided by the 2009 *Cotton Field v. Mexico* case resolved by the Inter-American Court of Human Rights.⁵²⁰ A more in-depth examination is provided given the great significance of this case not only in affirming women's right to live free from violence but also their right to adequate reparations, including in aspects of structural vulnerability, and thus the implicit links drawn between these rights and the enjoyment of human security by women.⁵²¹

The *Cotton Field* was the first case to reach the Court related to the abductions and killings of more than 300 women and girls by non-state actors since 1993 in Ciudad Juárez (Chihuahua, Mexico). These cases have come to be known as the "Ciudad Juárez Femicidios" because they represent a pattern of criminality targeting women and girls from 15 to 25 years old who were

⁵¹⁵ See articles 2 and article 3 –which includes the prohibition of torture- of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁵¹⁶ *Case of Opuz v. Turkey*, *op. cit.*, para. 185.

⁵¹⁷ *Ibid.*, paras. 200 and 201.

⁵¹⁸ *E.S. and Others v. Slovakia*, Appl. No. 8227/04, 15 September, 2009; *Rantsev v. Cyprus and Russia*, Appl. No. 25965/04, 7 January 2010; *A. v. Croatia* 2010, Appl. No. 55164/08, 14 October 2010, and *Hajudova v. Slovakia*, Appl. No. 2660/03, 13 November, 2010.

⁵¹⁹ See *A.A. v Sweden*, Appl. No. 14499/09, 28 June 2012 (Final 28 September 2012); see the Dissenting Opinion of Judge Ann Power-Forde, who laments the retreat in this case from "the *Opuz* line" that she considered a positive development by the Court.

⁵²⁰ Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment of November 16, 2009 (Preliminary Objection, Merits, Reparations, and Costs).

⁵²¹ See Rubio Marín, Ruth and Clara Sandoval, "Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* judgment", in *Human Rights Quarterly*, Vol. 33, 2011.

disappeared, usually then subjected to sexual violence and then killed, having often been tortured and mutilated. The *Cotton Field* decision dealt specifically with the abduction, sexual violence, and killing of a young woman, Claudia Ivette González (20 years old), and two girls, Esmeralda Herrera Monreal (15 years old) and Laura Berenice Ramos Monárrez (17 years old) by non-State actors in 2001, and the subsequent failure of the state to act with due diligence in the investigation, prosecution and punishment of the perpetrators and to treat in a dignified way the next of kin of the deceased. Important for the effects of this thesis's argument on the links of insecurity to socio-economic precariousness, is the assessment that the three young women were of "humble origins". The remains of the three victims were found in a cotton field, where another five female bodies were also discovered; hence the name of the case.⁵²²

The case is extremely revealing for the purposes of this thesis because the Court based a significant part of its reasoning on the *severe, systemic and structural* threats and conditions of vulnerability experienced by victims, factors the idea of human security contributes to underline. In assessing the Ciudad Juárez situation the Court was willing to rely on reports produced by international bodies and actors such as the UN Committee on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Special Rapporteur on Violence Against Women, its Causes and its Consequences, the Inter-American Commission and even Amnesty International, as well as on those produced by the autonomous human rights body of the National Human Rights Commission and those issued by different local NGOs.⁵²³

Basing its decision on the legal parameters offered by the American Convention on Human Rights -the Pact of San José- as well as parts of the Belém do Pará Convention, the Court considered that the disappearances, killings and subsequent mistreatment and neglect of family members violated several rights including the rights to life, personal integrity and liberty, the rights of the child, as well as access to justice and judicial protection.⁵²⁴ Moreover the killings and disappearances were considered to be gender-based, and thus amounting to a violation of the right not to be subjected to discrimination.⁵²⁵ This was a result of both the fact that such crimes targeted women and girls specifically as well as the fact that they took place in the context of a prevalent culture of discrimination against women.⁵²⁶ The response of the Mexican authorities to these crimes was indeed plagued with irregularities, stereotypes, lack of adequate investigation and impunity.⁵²⁷

In the legal analysis, the IACHR highlighted the obligations of the State derived from the Inter-American Convention of Human Rights and the Convention Belém do Pará, placing due emphasis on the need to take positive measures of prevention as a means to fight against impunity.⁵²⁸ Literally,

The Tribunal reiterates that the States should not merely abstain from violating rights, but must adopt *positive measures* to be determined based on the specific needs of protection of the subject of law, either because of his or her personal situation or because of the specific

⁵²² *Cotton Field v. Mexico, op. cit.*, paras. 2; 165-168; 169-221.

⁵²³ *Ibid.*, paras. 140 and subsequent.

⁵²⁴ See Articles 4(1), 5(1), 5(2), and 7(1), as well as Article 19, Articles 8(1) and 25(1) of the American Convention on Human Rights (ACoHR); and Articles 7(b) and 7(c) of the Convention of Belém do Pará.

⁵²⁵ See Article 1(1) of the ACoHR.

⁵²⁶ IACHR, *Case of "Cotton Field" v. Mexico, op. cit.*, para. 144.

⁵²⁷ *Ibid.*, para. 146.

⁵²⁸ *Ibid.*, para 163.

circumstances in which he or she finds himself.⁵²⁹

For the Court the determining factor in triggering the State obligation regarding *prevention* and attention of gender-based violence as an obligation of the State, including in relation to *third parties* was the fact that the State “*knows, or ought to know*” of the situation. In this sense the case builds on the line of analysis initiated in the Inter-American System with *Maria da Penha Maia Fernandes v. Brazil*, the first case of gender-based violence and State responsibility dealt with by the IACoHR in 2001. The case referred to a woman beaten by her husband, shot with the intention of killing her, and while in recovery, electrocuted by him while she was bathing. The Inter-American Commission declared State responsibility of Brazil and issued a series of recommendations including broad remedies in relation with systematic problems of violence against women.⁵³⁰

Returning to the *Cotton Field Case*, in particular, the Court focused on two separate moments, as occasions that ought to have prompted heightened due diligence obligations: first, the moment in which the large scale violations in the region were duly documented making the State authorities clearly *aware of the situation of structural vulnerability* that women and girls encountered.⁵³¹ Second was the moment of the first hours after the abduction and disappearance of the woman and two girls, given that the State *knew* that they could be subjected to sexual violence and be killed which meant that it had a particularly strong obligation to prevent.⁵³²

The decision contains important insights as to how the duty to investigate and the consideration of what amounts to relevant evidence may be affected by a structural situation. In particular, the Court stressed the types of measures that should be taken in order to collect evidence of sexual violence during an autopsy of a person who has been killed with violence, pointing out that when systematic human rights violations are taking place, not to take into account such context during an investigation could jeopardise the investigation itself.⁵³³ It then took into account, the limited physical signs on the bodies of the victims, the pattern of criminal conduct in the killings of Ciudad Juárez and the failure by the Mexican authorities to gather proper evidence applying the required protocols to consider that although the sexual violence had not been duly proven in the case of the victims it could nevertheless be presumed.⁵³⁴

Far from limiting itself to a gender and human security-sensitive interpretation of the substantive and procedural aspects of the merits of the case, in the *Cotton Field* decision the Inter-American

⁵²⁹ *Ibid.*, para. 243. In particular the Court interpreted that Article 5 of the Inter-American Convention entailed the State’s duty to *prevent* and investigate possible acts of torture or other cruel, inhuman or degrading treatment (para. 246) and that Article 7(1) of the Convention [right to personal liberty and security] entailed the obligation of the State to *prevent* the liberty of the individual being violated by the actions of public officials and private third parties, and to investigate and punish the acts that violate the right (para. 247).

⁵³⁰ IACoHR, *Maria da Penha Maia Fernandes v. Brazil*, Case 12,051, Report No. 54/01, Annual Report, OEA/Ser.L/V.II.111 Doc.20 rev, 2000.

⁵³¹ In interpreting the *duty of due diligence*, the Court was guided by article 7(c) of the Belém do Pará Convention, which orders the state “to prevent, investigate and impose penalties for violence against women” in connection with the Inter-American Convention. The Court considered that states have an obligation to establish an integral policy of prevention capable of adequately responding to the risk factors faced by women in Ciudad Juárez, strengthening the institutions in charge of addressing violence against women and setting up an adequate complaint mechanism; *Ibid.*, para. 258.

⁵³² *Ibid.*, para. 283.

⁵³³ *Ibid.*, para. 366.

⁵³⁴ *Ibid.*, para. 220.

Court made a praiseworthy and only timidly precedented⁵³⁵ effort to carry through those sensitivities to the domain of reparations. In particular, the Court explicitly endorsed the need to make sure that reparations were gender sensitive, meaning that they bear in mind the different impact that violence has on men and on women,⁵³⁶ as well as duly transformative. Citing the Court:

[B]earing in mind the context of *structural discrimination* in which the facts of this case occurred, which was acknowledged by the State..., the *reparations* must be designed to change this situation, so that their effect is not only of restitution, but also of rectification...[R]e-establishment of the same structural context of violence and discrimination is not acceptable”.⁵³⁷

In other words, the Court interpreted that when violations are expressions of situations of risk that women systematically encounter, it is those situations of risk and the vulnerabilities into which they translate that must be addressed to give victims due redress in the forms of guarantees of non-repetition.

It was therefore not surprising to find that, among the concrete reparations measures that the Court ordered were not only monetary compensation measures for both material and moral harm; physical and mental rehabilitation measures, and measures of symbolic recognition, but also measures aimed at modifying the structural conditions so as to ensure non recurrence.⁵³⁸ As a concrete regional expression of the principles contained in the UN Basic Principles and Guidelines on Reparations adopted just a few years before,⁵³⁹ the Court recognized that impunity generated suffering and hence non-material harm to the victims of the *Cotton Field* case⁵⁴⁰ and ordered Mexico to investigate, prosecute and punish the perpetrators of the abduction, killing and inhuman treatment of the women and girls, not only as a primary obligation under the Inter-American Convention but also as a reparation measure and as a guarantee of non-repetition. The Court specifically indicated that sexual violence should be investigated taking into account internationally sanctioned guidelines such as those of the Istanbul and Minnesota Protocols.⁵⁴¹ The Court thus adopted a decided role in granting broad, detailed and structurally-directed reparations, as opposed to limiting itself to briefly ordering monetary compensation, as the tendency in the ECHR.⁵⁴²

⁵³⁵ See IACHR, *Case of Miguel Castro Castro Prison v. Peru*, Merits, Reparations and Costs; Judgment of November 25, 2006, Series C, No. 160.

⁵³⁶ *Cotton Field v. Mexico*, *op. cit.*, para. 451.

⁵³⁷ *Ibid.*, Para. 450. For an analysis of this case in relation to the evolution of VAW in human rights law and the related obligations under CEDAW, see Chinkin, Christine, “Violence Against Women”, in Freeman, Marsha, E., Christine Chinkin and Beate Rudolf (editors), *The UN Convention on the Elimination of all Forms of Discrimination Against Women: A Commentary*, *op. cit.*, pp. 455 and subsequent.

⁵³⁸ *Cotton Field v. Mexico*, *op. cit.*, see paras. 446-601.

⁵³⁹ See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by UN General Assembly resolution 60/147, 16 December 2005.

⁵⁴⁰ *Cotton Field v. Mexico*, *op. cit.*, para. 454.

⁵⁴¹ *Ibid.*, paras. 497-502.

⁵⁴² For an analysis of the role of the IACHR regarding reparations as less deferential with the State party, and a comparison between its follow-up mechanism and that of the ECHR, see Huneeus, Alexandra, “Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights”, in *Cornell International Law Journal*, Vol. 44, 2011, pp. 501-528, and specifically on the *Cotton Field Case*, see pp. 496 and 501.

Other important *guarantees of non-repetition* included the creation and updating of a national database with information of all missing women and girls and their genetic information,⁵⁴³ a measure that could be important for the investigations of such abductions and identification of the bodies found, as well as providing training to personnel directly or indirectly involved in the prevention, investigation and prosecution of violence against women. For the Court, such training should place emphasis on women's rights, on engendering *due diligence* during different judicial proceedings and on overcoming social stereotypes.⁵⁴⁴

Indeed, the role played by the Court in embedding the due diligence duty as an international human rights obligation has been pivotal. In looking at the development of due diligence obligations, though, one must not leave aside the role of the Inter-American Commission. Let us recall the crucial stand by the Commission in 2001 through the first case affirming State obligations in this respect concerning violence against women in *Maria da Penha Maia Fernandes v. Brazil*, reviewed above. It should be also brought to light that the Commission has jurisdiction to review complaints against the United States on the basis of the American Declaration on Human Rights, and to issue relevant remedies, a legal competence that has recently displayed its potential in a case of violence against women. In assessing U.S. actions in light of the American Declaration, the Commission concluded in the case of *Jessica Lenahan (Gonzales) et al. v. United States*, of 2011, that the State had failed to act with *due diligence* to protect Jessica Lenahan and Leslie, Katheryn and Rebecca Gonzales from *domestic violence*, which violated the State's obligation *not to discriminate* and to *provide for equal protection before the law* under Article II of the American Declaration. It also found responsibility in the fact that the State failed to undertake *reasonable measures to prevent the death* of Leslie, Katheryn and Rebecca Gonzales in violation of their right to life under Article I of the American Declaration, in conjunction with their right to special protection as girlchildren under Article VII of the American Declaration. Finally, in a similar position to that of the Court in *Cotton Field*, the Commission concluded that the State violated the right to judicial protection of Jessica Lenahan and her next-of-kin, under Article XVIII of the American Declaration.⁵⁴⁵

As a corollary, it should be noted that after the *Cotton Field Case*, the Inter-American Court resolved another two cases, also against Mexico, the *Inés Fernández Ortega Case* and the *Valentina Rosendo Cantú Case*, both of August 2010.⁵⁴⁶ In these sentences, the Court reaffirmed the due diligence standard regarding the protection of women's and girls' human rights. In *Rosendo Cantú*, a case involving the alleged rape of an indigenous woman by military officials in Guerrero, it explicitly sustained that this translated into *reinforced obligations of the State*.⁵⁴⁷

⁵⁴³ *Cotton Field v. Mexico*, *op. cit.*, para. 512.

⁵⁴⁴ *Ibid.*, paras. 451-452. Notice however, that the most far-reaching structural remedy asked by the victims was not granted by the Court only on procedural grounds. Thus, the Commission and the victims' representatives requested the Court to order Mexico to design and implement a coordinated and long-term public policy to guarantee that cases of violence against women would be prevented and investigated, the alleged perpetrators prosecuted and punished and the victims redressed; *Ibid.*, para. 475. Mexico argued that it already had such a policy in place, substantiating its claim with evidence of legal and policy measures taken between 2001 and 2009; *Ibid.*, paras. 476-477. The Court abstained from ordering the measures considering that the Commission and the victims' representatives had not provided the Court with sufficient arguments to prove that the measures adopted by Mexico did not amount to such a policy; *Ibid.*, para. 493.

⁵⁴⁵ See IACoHR, *Jessica Lenahan (Gonzales) et al. v. United States*, Case 12.626, Report No. 80/11, OEA/Ser.L/V/II.142, 2011, para. 199.

⁵⁴⁶ IACHR, *Inés Fernández Ortega and Others v. Mexico*, (Ser. C) No 215, 30 August 2010; and *Valentina Rosendo Cantú and other v. Mexico*, (Ser. C) No 216, 31 August 2010.

⁵⁴⁷ *Rosendo Cantú v. Mexico*, *Ibid.*, paras. 175 and 182.

Unfortunately, it failed to draw the logical conclusions of its prior doctrine regarding gender sensitive and transformative reparations.⁵⁴⁸

However, in light of recent decisions specifically resulting from the *Cotton Field* judgment, reasons for hope on the local effect of international developments in women's human security and human rights may be held. As an explicit measure of implementation of the IACHR's requirement to adapt the Mexican criminal investigation procedures to the Istanbul Protocol and consequently create a national database of missing women and related genetic information as referred to above, in October 2012 the Office of the Mexico City General Attorney (*Procuraduría General de Justicia del Distrito Federal*), issued a Protocol for the Immediate Search of Missing Persons, especially Women, Girls, Boys and Adolescents, which includes the obligation of creating a System of Genetic Data through the necessary inter-institutional cooperation and incorporates the *principle of due diligence* as one of the standards guiding State obligations in this matter.⁵⁴⁹

From the examination of this chapter, it is worthwhile noticing parallelisms between the human rights case law just analysed and the set of concerns posted in the literature around human security, so much so that one wonders whether this may be pure coincidence or whether instead human rights and human security communities are exercising reciprocal influences on each other.⁵⁵⁰

In other words, what we find are doors being opened for analysis and debate on the *interpretative synergies* that may arise between the concepts of human security and human rights. In particular, and in the light of the mentioned cases, it seems that the human security approach, in placing emphasis on severe threats, situations of risk and structural vulnerabilities that individuals encounter as obstacles to the enjoyment of their most fundamental human rights, underscores some of the insufficiencies of the classical doctrine of individual human rights, while theoretically grounding some of the more interesting and expansive recent evolutions on human rights violations and State responsibility.

As the analysed examples demonstrate, the evolution of human rights is moving along these lines, in a parallel and possibly interconnected way with the different uses and debates surrounding human security.⁵⁵¹ Regardless of whether this is being done in an intended or explicit manner, the

⁵⁴⁸ In this sense, see Rubio Marín, Ruth and Clara Sandoval, "Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* judgment", *op. cit.*, p. 1090.

⁵⁴⁹ Procuraduría General de Justicia del Distrito Federal, "Acuerdo A/015/2012 del C. Procurador General De Justicia Del Distrito Federal, por el que se emite el Protocolo Para La Búsqueda Inmediata de Personas en Situación de Extravío o Ausencia, en Especial de Mujeres, Niñas, Niños y Adolescentes", *Gaceta Oficial del Distrito Federal*, 4 October, 2012; preambular para. 1 (*Considerando*) and points *Segundo I.*; *Decimotercero-Decimosexto* of the Protocol, at pp. 5; 7 and 12-14.

⁵⁵⁰ Regarding the relationship between (in)security and domestic violence, it is also interesting to note that the recent report by the Inter-American Commission of Human Rights on *Citizen Security and Human Rights*, dedicates a chapter precisely to gender-based violence, reviewing it from the perspective of *reinforced obligations of the State* in the area of violence against women pursuant to the Convention of Belém do Pará. See OEA/Ser.L/V/II, Doc. 57, 31 December 2009, Chapter IV., A., 4.

⁵⁵¹ A good example in this respect is the *amicus curiae* presented by Carla Ferstman, Director of Redress -one of the main NGOs in the issue of reparations for human rights' violations- within the case of *Cotton Field v. Mexico*, *op. cit.*, see para. 14, footnote 21. Carla Ferstman is at the same time one of the editors of the book *Human Security and Non-Citizens. Law, Policy and International Affairs*, published a few months after this case, illustrating the possibilities of the "human rights community" in engaging in dialogue with new global concepts and creating synergies in favor of the advancement of both human security and human rights of women and girls.

fact is that both developments are synchronized in adopting a comprehensive view of human rights and human vulnerabilities, which as this chapter suggests, may be and should be usefully taken advantage of for the effective realisation of human rights of women and girls.

Change may indeed be in the air. In fact, one of the most recent UN positions on violence against women within the Human Rights Council titled in 2010 “Accelerating efforts to eliminate all forms of violence against women: *ensuring due diligence in prevention*” closely links human rights and personal security concepts; duly underscores the notion of risk and vulnerability linked to the structural and pervasive dimension of the problem and highlights the State obligation to enhance preventive measures in every domain of women’s existence, as well as to fight against discrimination and to ensure the realisation of all human rights by women and girls, including those of socio-economic nature, as key factors in preventing violence against them.⁵⁵² Similarly, the 2013 annual report of the UN Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rashida Manjoo, will actually be devoted to a study on the “State responsibility for eliminating violence against women”. This analysis intends to be carried out as a global study of the interpretation and implementation of the *due diligence obligation* by States, to be submitted to the Human Rights Council next year.⁵⁵³

III.5 Some conclusions: a gendered human security and the right of women and girls to live free from violence

Constructing human security from a strong gender and human rights-based approach, as suggested in this chapter, allows highlighting and reinforcing State obligations in identified contexts and with regards to persons in situations of structural *vulnerability*, such as women and girls who are often subject to multiple forms of discrimination and violence. Indeed, being broad and person-centered, the idea of human security offers a door of entry to push forward a more comprehensive definition of violence that does not only comprise armed means of force that threaten or harm physical integrity, but also other means of coercion and deprivation that cause various types of harm. At the same time, an engendered human security may contribute to highlight the structural inequalities and discrimination that cause general conditions of vulnerabilities for women and girls at the collective level, a challenge that is hard to address when looking at the individual violations of human rights as isolated events.

In this sense, it is submitted that human security thus understood also provides criteria to assess the adequacy of measures taken by the State to protect the human security of women and girls, either at an individual or community level, in cases when the State knew or should have known of the severe threats or risk situations confronting women. It is contended that this also promotes a proactive rather than a reactive or defensive approach, as it usually occurs in the analysis of individual cases of human rights’ violations.

Reviewing the mutual interconnections between human security and human rights, this chapter has argued that International Human Rights Law helps make visible the ways in which violence against women threatens and affects their human rights and general well-being. The human security concept should duly consider and make use of international human rights standards on the

⁵⁵² United Nations General Assembly, Human Rights Council, Resolution A/HRC/RES/14/12. 30 June (adopted without a vote). Emphasis added. See in particular, P.P.5; P.P.9 and P.P. 10; and O.P. 6, O.P.10, and O.P. 11.

⁵⁵³ See <http://www.ohchr.org/EN/NewsEvents/Pages/PreventionViolenceAgainstWomen.aspx>

subject. Indeed, providing human security with a gender and human rights content is one of the possible ways to help give it a more precise scope, delineate its contours and spell out the State obligations in concrete cases involving persons in very wide-ranging conditions of vulnerability.

Inversely, the human security concept can also contribute for a “managed expansion” of international human rights law.⁵⁵⁴ As the recent case-law of the European and Inter-American Courts of Human Rights has reaffirmed, there exists a *causal link* between State negligence and human rights violations of the women and girls that constitute the direct victims of such violations, but also of women and girls in the society at large. In this sense, the focus that the human security concept places on risk situations would allow to explicitly identify contexts that present systemic threats to women and girls. The express declaration of a risk situation would act as a “detonator” activating and reinforcing human rights’ obligations of the State, especially to take preventive measures, address the causes of the violations of human rights that have already taken place and to grant reparations that redress individuals for the harm they have suffered while seeking to also redress the generalized conditions that facilitated such violations. More systemically, a human security “red alarm” could act as a trigger for the design and implementation of public policies of prevention and attention to conditions of structural vulnerability confronted by women and girls encouraging the State to comply with its obligations to respect, protect and fulfil the human rights of women and girls under its jurisdiction.

Fleshing out the intersections between human security and human rights, the chapter has suggested there are *synergies* which can generate a more comprehensive understanding of the human rights of women and girls as well as more effective guarantees of their protection from the severe threats they confront. These synergies, if used further and in a more self-conscious way, may enrich judicial and quasi-judicial interpretations on the content of human rights and State responsibility, including in the domain of reparations, and duly inspire legal analyses on the structural conditions of vulnerability faced by women and girls potentially or actually affecting their human rights.

From the cases reviewed in this chapter, it can also be concluded that the wider definition of violence against women established in International Human Rights Law and incorporated into the human security notion, would have to be taken into account not only in judicial interpretation, but also by the State and actors engaging in the construction of security norms and policies, as an issue worthy of concern in evaluating risks, as well as in facing and reducing situations of vulnerability of persons.

At the same time, and closing the loop of this circle, the idea of human security itself, which emphasizes an expansive and inclusive view of risks and vulnerabilities, would gain conceptual precision by looking at International Human Rights Law and therefore framing its proposals and agenda in terms of rights and the interpretation of these rights provided by international human rights mechanisms. This may render the human security agenda one that is useful to foster not only a “rule of law” but also a “rule of rights” culture. In light of the grave vulnerabilities faced by women and girls, and the serious human insecurity they confront this would offer an especially timely tool to be used as a policy framework as well as an “orienting concept” to better identify vulnerabilities and open the path for more creative and integral legal analysis.

⁵⁵⁴ In this sense, see Edwards, Alice and Carla Ferstman (editors), *Human Security and Non-Citizens: Law, Policy and International Affairs*, *op. cit.*, p. 9.

In these ways, a gendered and human rights-based approach to human security, may actually serve as an engine for emancipation and a real challenging force to existing asymmetries in power and resources, deep injustices and, fundamentally, serious gender inequalities, which involve, allow and provoke so many of the violations of the human rights of women and girls throughout the world today.

Chapter IV. Human security and human rights of undocumented migrants and other non-citizens

“It is true that we have risked to die.
But we were born in the wrong part of the world.
If we do not risk, we get nothing from this life”.

- Yousseff, an undocumented migrant in Italy

“How our societies treat migrants will determine whether we will succeed
in building societies based on justice, democracy,
dignity and *human security* for all”

- Navanethem Pillay, UN High Commissioner for Human Rights⁵⁵⁵

IV.1 Introduction

According to existing data of the International Organization for Migration (IOM), it was estimated that as of 2010 there were 214 million international migrants worldwide, that is, persons living and/or working in a country other than that of their birth or citizenship.⁵⁵⁶ The total number of international migrants has increased over the last 10 years from an estimated 150 million in 2000 to 214 million persons in 2010, i.e., 3.1% of the world's population are migrants. In other words, one of out of every 33 persons in the world today is a migrant (whereas in 2000 one out of every 35 persons was a migrant) and migrants would constitute the fifth most populous country in the world.⁵⁵⁷

Many of these persons are ‘migrant workers’, who are specifically contemplated by the international legal framework, which covers both documented and undocumented migrant workers, as well as members of their families. However, it is hard to provide an exact number of undocumented migrants to whom these norms are applicable, precisely because of the irregular legal status of several migrants trying to reach, enter, or reside in another country, or that are already living or working in host societies. There are, however, estimates that indicate that between 10 and 15% of the world’s international migrants are in an irregular situation.⁵⁵⁸

⁵⁵⁵ Address by Ms. Navanethem Pillay, UN High Commissioner for Human Rights at the Global Forum on Migration and Development/Civil Society Days, Puerto Vallarta, México, 10 November 2008. This and previous quote taken from International Commission of Jurists, *Migration and International Human Rights Law*, Practitioners Guide No. 6, ICJ, Geneva, 2011, p. 27. Emphasis added.

⁵⁵⁶ International Organization for Migration, *World Migration Report 2011: Communicating Effectively About Migration*, 2011, p. 49.

⁵⁵⁷ See <http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/lang/en>

⁵⁵⁸ ILO, *International labour migration: A rights-based approach*, 2010, p. 32.

The lack of a documented legal status often shadows these persons' identity, labour conditions, enjoyment of rights and life experiences more generally. This in turn causes undocumented migrants to be placed in conditions of vulnerability to abuses and violations of their human rights.

Although the focus of human rights has frequently been used as a critical approach to domestic and global problems and inequalities, the framework of human rights itself, as has been argued throughout this thesis, with its emphasis on individual violations, often provides a fragmented picture of phenomena that are in fact interconnected.

To such extent, this chapter will explore whether the concept of human security, with its more comprehensive view of widespread threats and risks, may contribute to a more integrated approach towards the rights of undocumented migrants situated in critical and at times deadly conditions at State borders; or living in vulnerable conditions within given national borders or in transit through different territorial jurisdictions. Thus, the present chapter addresses the question of whether International Human Rights Law can be enriched through the concept of human security, to adapt to the national, transnational and global challenges posed by migration and faced by migrant persons in an undocumented situation.

Undocumented migration takes place against a background of an unequal global distribution of resources, services and opportunities, and complex threats confronted or perceived by governments that have provoked increasingly restrictive immigration measures, as well as certain fear-driven responses expressed in an often racialised "othering" of individuals and populations on the move. This has led to a process of "securitization" of migration by certain States and political positions, a fact that has raised concern over the possible pernicious effects of placing security and migration in the same box.⁵⁵⁹ In this context, it must be stressed from the outset that this chapter proposes to explore this subject not as a path to securitize human mobility, but as an approach to humanize security for migrants.

Indeed, as this text shows, the existing geographical borders also draw the lines that shape the experience of the migrant in her or his journey through various physical spaces and jurisdictions. In some cases, these lines can signify the difference between life and death, on the one hand, or between a life with dignity or one filled with fear, on the other, as illustrated below. In this sense, regarding the human rights of undocumented migrants, two main situations can be distinguished: 1) undocumented migrants at the border and 'deaths at the fault-line'; and 2) risks to human rights of undocumented migrants once in the territory of the receiving State.

Both types of factual situations converge into another two fields worthy of separate consideration: the particular risks faced by undocumented migrant women and girls that are revealed when analysed under a gendered human security lens as proposed in Chapter III above. A human security perspective is applied as well to briefly review the specific risks faced by asylum seekers as a category of persons that, like undocumented migrants, has been particularly struck by the

⁵⁵⁹ See Suhrke, Astrid, *op. cit.*, pp. 106-107. See also Benítez Manaut, Raúl and Daniel Hernández, "Migración y Seguridad. Nueva clave en las relaciones Estados Unidos, México, Centroamérica", in Sepúlveda, Isidro (editor), *Seguridad Humana y nuevas políticas de defensa en Iberoamérica*, Instituto Universitario General Gutiérrez Mellado, Madrid, 2007, pp. 269-290, who review post-9/11 transformations in U.S. and continental security policy to now cover migration, including for example measures such as the U.S. proposal of construction of a wall between the U.S. and Mexico. See as well the analysis offered in Guild, Elspeth, *Security and migration in the 21st century*, Malden, MA, Polity, Cambridge, 2009.

‘securitization’ of migration and more so by the economic crisis in many countries, translated also into a protection crisis, at times coupled with the institutionalization of certain national or regional frameworks, such as that of EU Law, that water-down or undermine existing human rights standards in the field. At the same time, some recent legal interpretations on asylum seekers, including at the European level, open the door for an interesting analysis of the human security-human rights intersection, and are thus reviewed on their own footing at certain instances.

The relationship between human security and the human rights of undocumented migrants in all of these scenarios will be fleshed out considering that: a) migrants frequently face violations of their human rights; b) the sole state of legal irregularity is in itself a condition of vulnerability; and c) the international legal framework for the rights of migrants, in relation to their condition of migrants as such, and especially as undocumented migrants, is not fully nor coherently developed. There are gaps in existing International Human Rights Law on this subject, which only partially covers the condition of ‘migrant workers’. Although migrants may hold overlapping identities, in their character of *only* migrants they fall outside other legal categories (indigenous peoples, internally displaced persons, refugees or stateless persons) and therefore they suffer from serious lack of protection.⁵⁶⁰

This chapter intends to analyse these issues applying the lens of human security to the situation of human rights of undocumented migrants. It will do so by first reviewing the understanding of this text of undocumented migrants and their relationship with State sovereignty and national borders under the proposed human security framework. It then looks at in section IV.2 at international human rights law at the universal level of UN instruments addressing undocumented migrants as well as the regional expressions concerning them. It will then spell out in section IV.3 the various conceptual interconnections between human security and human rights of undocumented migrant persons, and apply them both at the empirical level and in the scope of legal analysis. The specific implications of adopting a gendered human security lens as proposed in Chapter III to undocumented migrants and the particular risks faced by migrant girls and women, as well as some of the particular human security threats encountered by asylum seekers, are made explicit and reviewed. In section IV.4 the text will reflect on some illustrative quasi-judicial and judicial cases that intend to exemplify how a human security-sensitive perspective may orient human rights’ interpretation when put to work in practice, as well as the consequences that may unfold when it is overlooked. This part will draw the picture of how some of the identified normative tools may be utilized to enhance human rights protection when applied through a human security-based approach or reduce such protection when disregarded, to conclude in section IV.5 with some reflections on the right to have access to rights as a necessary human security requirement for the respect and fulfilment of the universal human rights of undocumented migrants.

The positions developed in this thesis accompany a growing concern by several human rights bodies on the critical risks faced by migrants, increasingly translated into life and rights-threatening conditions, these potential dangers often being concretized in severe violations to their rights. From the spectrum of persons in structural conditions of vulnerability related to human mobility, this chapter focuses mainly on undocumented migrants and to a certain extent on asylum seekers and the human insecurities they confront as an issue that allows for novel questions for human rights and revisits others under a new light.

⁵⁶⁰ In this sense, see Alice Edwards and Carla Ferstman (editors), *Human Security and Non-Citizens: Law, Policy and International Affairs*, Cambridge University Press, 2010, pp. 4-5.

IV.1.1 Who is an undocumented migrant?

While the international legal framework presents a definition of migrant worker -applicable both to documented and undocumented migrant workers-, it does not offer one of the migrant person more generally, particularly those in an irregular situation regarding their entry or residence to a given State. A notable exception is Advisory Opinion 18/03 of the Inter-American Court of Human Rights, *Juridical Condition and Rights of Undocumented Migrants*,⁵⁶¹ that deals with certain legal questions and principles applicable to all migrants (workers or not, documented or undocumented). Although this is an instrument of a non-binding nature, it has an authoritative power as a judicial opinion originating from the competent body to interpret the legal content of the human rights treaties at the Inter-American level. AO 18/03 defines ‘migrant’ as any person who emigrates (leaves a State in order to transfer to another and establish him/herself there) or immigrates (enters another State in order to reside there).⁵⁶²

Specifically by ‘undocumented migrant’, this text understands those persons without a permit authorizing them to enter, to stay or to engage in a remunerated activity in the State of destination pursuant to the law of that State and to international agreements to which it is a party.⁵⁶³ As this text evidences, they may have been unsuccessful in the asylum procedure, have overstayed their visa or have entered irregularly. The routes to becoming an undocumented migrant are complex and often the result of arbitrary policies and procedures over which the migrant has little or no control.

Some of the sources reviewed in this chapter address ‘irregular’ migration, a term which may also be used throughout this text under the same meaning of ‘undocumented’ migration. On the other hand, this thesis rejects the use of the term ‘illegal migration’ or ‘illegal migrants’ considering, as emphasized by Mary Robinson -former President of Ireland and UN High Commissioner for Human Rights-, that “there is no such thing as an illegal person”. As she pointed out in citing the 2001 Durban World Conference Against Racism and later developments, in Durban “the strongest international statement yet was applied to the rights of *migrants*. Yet *in the decade since then*, in real terms, there has been a *marked deterioration in migrant status*: whether by Europe erecting further barriers to entry, whether by the United States enacting harsher laws against what it terms ‘illegal aliens’ from Mexico and other parts of Latin America or whether by rising xenophobia in African countries, including South Africa”.⁵⁶⁴

Indeed, to qualify migrants as ‘illegal’ contributes to the criminalization of migration, real or terminological, and feeds into the stereotyping of this sector of the population as persons who

⁵⁶¹ Inter-American Court of Human Rights, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of 17 September 2003 requested by the United Mexican States (AO 18-03).

⁵⁶² AO 18-03, *op. cit.*, para. 69, a) to e).

⁵⁶³ Based on article 5 of the UN CRMW and adapted to cover not only migrant workers but migrant persons in general; see also UN Committee on RMW, *Draft General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, December 2012, point I.3, available at <http://www2.ohchr.org/english/bodies/CRMW/GC2.htm>

⁵⁶⁴ See Nelson Mandela Centre of Memory, “Transcript of Mary Robinson’s Nelson Mandela Annual Lecture. Freedom, truth, democracy: citizenship and common purpose”, 5 August 2012 (emphasis added), available at <http://www.nelsonmandela.org/news/entry/transcript-of-mary-robinsons-nelson-mandela-annual-lecture>

disregard the law and the social arrangements of the society they transit through or live in.⁵⁶⁵ The categorization of a person as illegal may violate the universal right to a legal personality that everyone is entitled to. Let us recall that article 6 of the UDHR clearly asserts that “*Everyone* has the right to recognition *everywhere* as a person before the law”.

In my view, apart from these problematic aspects in terms of respect for human rights, the label ‘illegal migration’ also leads to confusion with actually criminal activities covered by their own international normative and regulatory framework, namely, human smuggling and human trafficking.⁵⁶⁶ Certainly, at times the entrance of migrants into the host State occurs as a result of such activities, but for conceptual and practical purposes addressed in this section, the distinctions should be kept in mind. This thesis does not deal directly with the two phenomena of human smuggling or human trafficking, and only addresses them insofar as they contribute to heightening the vulnerability faced by undocumented migrants and thus constitute human security concerns.

Regarding some of the migration-receiving regions and countries of the developed world, civil society actors addressing this field in Europe, for example, estimate that the majority of undocumented migrants entered Europe legally but after a period of time, experienced difficulties and found themselves without the relevant permit for residence or employment, and stress that “irregularity is caused by an administrative infringement and not a criminal offence. It is often a process fueled by exploitation, redundancy, misinformation and administrative delays”.⁵⁶⁷

International human movement, though, has become a highly controversial issue –*not only in ‘rich’ member countries* of the Organization for Economic Cooperation and Development (OECD) but also *in States that are comparatively wealthy*. Countries like South Africa and Malaysia attract significant numbers of migrants from within their regions, and face challenges that resemble those which confront the United States or the European Union (EU). Some societies, such as India, Mexico and Thailand, *both attract migrants and send many of their citizens abroad* in search of better opportunities. “Expatriates” too, move across the globe, between countries of the North and to countries of the South, to manage business, conduct diplomacy or do humanitarian work. Very significant movements of people also occur *within the South*, in numbers that surpass the more publicised South-North migration.⁵⁶⁸

Indeed, in terms of absolute numbers in millions of migrant persons, we find the U.S. (42.8), the Russian Federation (12.3), Germany (10.8), Saudi Arabia (7.3) and Canada (7.2). However, and possibly in contrast to popular perception, the receiving countries with the highest number of migrants, in terms of percentage of their total population, are not in the Global North. Actually,

⁵⁶⁵ See UN Committee on RMW, *Draft General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, *op. cit.*, point I.3.

⁵⁶⁶ Such activities are covered by the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children; and Protocol Against Smuggling by Land, Sea and Air, both supplementing the United Nations Convention against Transnational Organized Crime, “Palermo Convention”, all three instruments adopted and opened for signature, ratification and accession by UN General Assembly resolution 55/25 of 15 November 2000. The Protocol Against Trafficking entered into force on 25 December 2003 and the Protocol Against Smuggling on 28 January 2004.

⁵⁶⁷ See <http://picum.org/en/our-work/undocumented-migrants/> The Platform for International Cooperation on Undocumented Migrants (PICUM) leads a “network of concerned individuals and organizations committed to ensuring real sustainable change for undocumented migrants by informing and influencing policy makers”.

⁵⁶⁸ International Council on Human Rights Policy, *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*, Geneva, 2010, p. vi.

countries with a high percentage of migrants include Qatar (87%), United Arab Emirates (70%), Kuwait (68%), Jordan (46%), Singapore (41%), and Saudi Arabia (28%).⁵⁶⁹

In the European context, for example, figures of 2010 indicate that Switzerland is among the countries in Europe with the highest percentage quota of foreigners in comparison with its permanent population: 21.9% of the overall population are foreigners. Within the EU, Luxembourg also presents a high percentage with 35.2% of migrant population.⁵⁷⁰ The total number of non-EU nationals living on the territory of the EU Member States in 2010 was 20.2 million, representing around 4% of the total EU population. This means that 9.4% of the world's migrants are third-country nationals residing in the EU. Covering a broader geographic area, the two sub-regions of Europe and Central Asia combined host 72.5 million migrants, representing 8.7% of the total population of such regions.⁵⁷¹ This last figure contrasts with the high percentage of migrants present in societies of the Global South.

While the number of total undocumented migrants in the world is hard to calculate, as was mentioned above, the IOM does offer some data based on national studies of certain countries. For example in the United States (US), the estimated number of irregular migrants in 2010 was of 11.2 million people, most of which are Hispanic, and many of them Mexican.⁵⁷² Against that background, especially in speaking of such a sizeable part of the population, civil society in the US has highlighted immigrant rights as a thermometer to test the condition of human rights in the society at large, by signalling that “When the government has the power to deny legal rights and due process to one vulnerable group, everyone's rights are at risk”.⁵⁷³

There are available figures in other regional settings. In the case of the EU, estimates suggest that in 2008 there were between 1.9 to 3.8 million persons residing irregularly in the EU, a figure which represents a decrease in the calculated number of irregular migrants residing in the EU in 2005 (3.1 to 5.3 million).⁵⁷⁴ Other accounts may also be found in the Middle East and North

⁵⁶⁹ International Organization for Migration, Facts and Figures; see <http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/lang/en>; and Migration and Remittances Factbook 2011, World Bank, available at <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1199807908806/Top10.pdf>; See also interesting data in Gallup's Potential Net Migration Index, a score of the estimated number of adults who would like to move permanently out of a country if the opportunity arose, subtracted from the estimated number who would like to move into it, as a proportion of the total adult population, available at <http://www.gallup.com/poll/142364/migration-triple-populations-wealthy-nations.aspx>

⁵⁷⁰ International Organization for Migration; see <http://www.iom.int/cms/en/sites/iom/home/where-we-work/europa/european-economic-area/switzerland.html> and <http://www.iom.int/cms/en/sites/iom/home/where-we-work/europa/european-economic-area/luxembourg.html>

⁵⁷¹ International Organization for Migration; see <http://www.iom.int/cms/en/sites/iom/home/where-we-work/europa.html> and <http://www.iom.int/cms/en/sites/iom/home/where-we-work/europa/european-economic-area.html> Note also that France is the fifth top remittance-receiving country, India being the first, followed by China, Mexico and the Philippines (measured in absolute terms in billion USD); see Migration and Remittances Factbook 2011, World Bank, *op. cit.*

⁵⁷² International Organization for Migration, *World Migration Report 2011: Communicating Effectively About Migration*, 2011, p. 61.

⁵⁷³ See American Civil Liberties Union (ACLU), “ACLU's Immigrants' Rights Project”, available at <http://www.aclu.org/immigrants-rights/about-aclus-immigrants-rights-project>

⁵⁷⁴ Centre for European Policy Studies (CEPS)/European Union, *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union*, Authors: Sergio Carrera and Joanna Parkin, EU, p. 9.

Africa. To give but one example, recent studies estimate that between 2006 and 2012, at least 230,000 Ethiopians entered Yemen as irregular maritime migrants.⁵⁷⁵

What recent wide-reaching accounts of international migration clearly point to is the increasing amount of migrants, both documented and undocumented, and in absolute numbers as well as in percentage terms in relation to world population, as shown below:

**International (documented and irregular) migrants (in millions)
worldwide 1970-2010⁵⁷⁶**

	Migrants	Population	World %
1970	81.3	3 696	2.2
1975	86.8	4 074	2.1
1980	99.3	4 442	2.2
1985	111	4 844	2.3
1990	154.9	5 280	2.9
1995	165.1	5 692	2.9
2000	176.7	6 086	2.9
2005	190.6	6 465	3.1
2010	213.9	6 793	3.1

Despite these growing figures, the number of international migrants still represents a relatively low percentage of the world's population, and it is certainly lower than the amount of internal migrants, that is, persons voluntarily moving or forcefully displaced within national borders. Indeed, it was estimated in 2000 that the number of internal migrants worldwide amounted to 740 million people, four times the number of global international migrants at the time,⁵⁷⁷ calculated today at 214 million people, as mentioned above and reflected in the table above.

Taking simply the case of China, for instance, a recent case study of rural-to-urban migrant workers, illustrates that only in 2008 approximately 132 million migrant workers had moved from the country's rural regions to urban centers in search of work, usually performing low-wage jobs. One must bear in mind that the legal uncertainty and the societal bias that marginalizes undocumented migrants crossing international borders is at times also shared by these rural-urban migrant workers at the national level. Because of their status as 'temporary residents' (as opposed to 'permanent urban residents'), they are denied basic rights and services, as studied through *human security indicators* developed to assess their condition.⁵⁷⁸

⁵⁷⁵ Danish Refugee Council (Regional Office for the Horn of Africa & Yemen)/Regional Mixed Migration Secretariat (RMMS), *Desperate choices: conditions, risks & protection failures affecting Ethiopian migrants in Yemen*, European Commission/Swiss Agency for Development and Cooperation (SDC), October 2012, p. 8.

⁵⁷⁶ Table from International Council on Human Rights Policy (ICHRP), *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*, Geneva, 2010, p. 11. The publication bases its data on UN Department of Economic and Social Affairs (DESA), <http://esa.un.org/migration>. Percentages of world international migrants presented in such publication are calculated from UN DESA's statistics.

⁵⁷⁷ UNDP data, available at <http://hdr.undp.org/en/statistics/data/mobility/people/>

⁵⁷⁸ Xu, Qingwen, "Migrant Workers in China: Rights and Security", in *RDD. Regional Development Dialogue: Assessing Human Security*, Vol. 31, No. 1, Spring 2010, United Nations Center for Regional Development, Nagoya, Japan, pp. 114-129. Emphasis added. The author develops such human security indicators and she explains how despite the fact that economic development in the past decades has been fueled in part by these under-educated, low-

Despite the much higher number of migrants within national frontiers, human movement crossing international borders has become one of the most intractable and sensitive policy issues. Indeed, the political significance of international migration exceeds by far its numeric importance.⁵⁷⁹

Other people moving from their place of birth or residence as well as other non-citizens may well fall under shared human security concerns on the basis of their vulnerable condition, the threats to their human rights or the actual violations they suffer. Think precisely of internal migrants, including internally displaced persons (IDPs), stateless persons, asylum seekers or actual refugees.⁵⁸⁰

Actually, the condition of IDPs as a human security matter has been highlighted in the judicial arena of the Inter-American system, through a Concurring Opinion of Judge Antônio A. Cançado Trindade, in a vivid example of the way judicial interpretation can concretize and bring to life the human security/human rights symbiosis addressed in this thesis. In the case of *Sawhoyamaxa Indigenous Community v. Paraguay*, of 2006, based on an academic study on human security and human dignity, Judge Cançado reminds us that “The problem of internally displaced people...is actually a human rights problem. Displaced people are in a *vulnerable situation* precisely because of the fact they are under the jurisdiction of the State ... (their own State) that did not adopt enough measures to *avoid* or *prevent* the situation of virtual desertion they came to suffer”.⁵⁸¹

It is true also that in real-life situations, human mobility is a phenomenon of mixed flows and at times it is not easy to conclude on the legal categorization of a person, whether her condition is that of an asylum seeker, a refugee, a stateless person, a displaced person or an economic migrant. With the economic crisis affecting the U.S. and more intensely Western Europe, the tendency to rigidify immigration measures has at times led to a blurring in these distinctions with the consequent lack of due protection.⁵⁸²

wage migrant workers who have flocked to Chinese cities for manufacturing jobs, because of their status as ‘temporary residents’ (as opposed to ‘permanent urban residents’), they have severe difficulties in accessing social rights such as housing and health services.

⁵⁷⁹ See ICHRP, *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*, *op. cit.*, p. 8; and Oberoi, Pia, “Empowering migrants: human security, human rights and policy”, in Edwards, Alice and Carla Ferstman (editors), *Human Security and Non-Citizens: Law, Policy and International Affairs*, *op. cit.*, p. 227.

⁵⁸⁰ The UN High Commissioner for Refugees (UNHCR) estimates that there are currently over 43 million refugees and internally displaced persons (IDP) around the globe as well as around 12 million stateless people; see www.unhcr.org. The recent World Disasters Report of 2012 indicates that there are 73 million forced migrants in the world, referring to “people forced to flee their homes and communities because of many factors including conflicts, persecution, disasters and poverty”; see The International Federation of Red Cross and Red Crescent Societies (IFRC), *World Disasters Report 2012: Focus on forced migration and displacement*, *op. cit.* Such figure may overlap with many of the IDPs, refugees and stateless people worldwide, but at the same time exceeds the number of people covered by such categories, indicating the need for a broader assessment of the complex phenomenon of human mobility. For a full analysis of these concerns, see Edwards, Alice and Carla Ferstman, *Human Security and Non-Citizens: Law, Policy and International Affairs*, *op. cit.*

⁵⁸¹ IACHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006 (Merits, Reparations and Costs), Separate Opinion of Judge A. A. Cançado Trindade, supporting his argument on the work of M. Stavropoulou, “Searching for Human Security and Dignity: Human Rights, Refugees, and the Internally Displaced”, in *The Universal Declaration of Human Rights: Fifty Years and Beyond* (eds. Y. Danieli, E. Stamatopoulou and C.J. Dias), Amityville/N.Y., Baywood Publ. Co., 1999, pages 181-182; at para. 14, footnote 20. Emphasis added.

⁵⁸² See Chetail, Vincent and Celine Bauloz, *The European Union and the Challenges of Forced Migration: From Economic Crisis to Protection Crisis?*, *op. cit.* It is not a coincidence that recently, in 2012, the Inter-American

However, for the effects of this thesis, I will concentrate on reviewing the human security and human rights of international undocumented migrants as a matter pertaining to the framework developed by International Law and allowing for a novel examination under the human security lens.

Consequently, turning to definitions at the international level, in the realm of UN instruments, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CRMW)⁵⁸³ offers a definition of ‘migrant worker’, thus emphasizing the global legal consideration of migration mainly as a situation related to labour. This Convention sets forth in Article 2.1, that

The term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

As to the legal status of migrants, the CRMW clarifies in Article 5 that for the purposes of the Convention, migrant workers and members of their families:

(a) Are considered as *documented or in a regular situation* if they are authorized to enter, to stay *and* to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;

(b) Are considered as *non-documented or in an irregular situation* if they do not comply with the conditions provided for in subparagraph (a) of the present Article.

What seems clear from the definition is that the recurrence to the State –not any State, but the “State of employment”- as the relevant actor to define the regularity or the resulting irregularity ‘by default’ that the CRMW advances, is a given even in the only universal human rights instrument on the subject. There is no reference to a superior authoritative device to delimit admissible membership to the political community.⁵⁸⁴ Notice as well the emphasized conjunctive *and* (not *or*) uniting the possibilities for being considered a documented migrant under the CRMW, that is, conditioning the character of regularity to the engagement in a remunerated activity, thus reinforcing only the labour dimension of migration.⁵⁸⁵ Note also the requirement for an explicit and a formal (“pursuant to the law of that State”) and not a *de facto* authorization that

Commission of Human Rights decided to broaden the scope of the mandate of its Special Rapporteur on the Rights of Migrant Workers and their Families to cover other vulnerable groups in need. The Commission considered that in order to respond “to the multiple challenges of human mobility in the region, the new mandate focuses on the respect and guarantee of the rights of migrants and their families, asylum seekers, refugees, complementary protection seekers and beneficiaries, stateless persons, victims of human trafficking, internally displaced persons...and other vulnerable groups within the context of human mobility”; see the reference of the decision taken at the 144 period of sessions of the IACHR on March 30, 2012, at <http://www.cidh.org/Migrantes/migrants.background.htm>

⁵⁸³ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CRMW), adopted by General Assembly resolution 45/158 of 18 December 1990 and entered into force on 1 July 2003.

⁵⁸⁴ See related analysis in Weissbrodt, David, *The Human Rights of Non-Citizens*, Oxford University Press, Oxford, 2008, in the chapter concerning undocumented migrants.

⁵⁸⁵ In this last sense, concerning the consideration of migrant persons dominantly under an instrumental focus prioritizing their utility for the functioning of the global economy, see the reflections in Dauvergne, Catherine, *Making People Illegal: What Globalization Means for Migration and Law*, Law in Context Series, Cambridge University Press, 2008, at Chapter I.

could, under other interpretations, arise when the host State displays actions or omissions of toleration or even acknowledgment of the presence of migrants within its jurisdiction. Let us then turn to the specific modes of argumentation used to defend a legal and political regime that creates risks to the rights of persons and thus allows and constructs their exclusion from the rule of law.

IV.1.2 A world without borders? State sovereignty and undocumented migrants

From the narrative described above, the picture of human rights of undocumented migrants and the risks confronting them provides a scene with many grey areas. It is also not a static image: the State's immigration and social protection measures may move from one side of the spectrum to another -from open to more restrictive, from rights' respecting to arbitrary- depending on different aims in public policy, economic constraints or electoral objectives.

In parallel to the definition of undocumented migrants provided above, it must not be overlooked that many undocumented migrants are not migrants anymore, at least not in the strict sense of the term, since they are not in movement from one place of residence and/or work to another. More precisely, they are immigrants settled in the country of destination and often are full-fledged members of the host political community and in some cases enjoy high levels of social integration. They pay taxes, contribute to the gross domestic product, are part of social and religious groups, and help shape their immediate collective environment and the cultural identity of their communities.

The other members of such communities, including authorities mostly at the national level, at times adopt a position of *quiet toleration* towards the presence of undocumented migrants, for a series of reasons ranging from the desire to preserve social cohesion to the convenience of having them perform certain jobs and social functions.⁵⁸⁶ At the same time, it is local actors, including local authorities, who often work with limited resources to defend undocumented migrants' human rights and guarantee them a basic standard of living. These local actors are confronted on a daily basis with situations in which they witness that irregular legal status is an obstacle for a sizable part of the population in accessing basic social services. Professional groups, such as doctors and teachers, experience clashes between what their professional ethics tell them to do and the incriminatory discourse regarding undocumented migrants.⁵⁸⁷

To better assess the risks faced by migrants using a human security frame with human rights at its core, a starting point would be to analyse the dangers associated to exercising the human right to freedom of movement. Such a right has been approached by political theory, legal sociology and human rights law itself. Mapping briefly some of these points constitutes an introductory door to open a space for looking at migrants' human rights through a human security lens.

From the standpoint of political theory, it has been argued that in spite of their many disagreements, liberal theories of justice are committed to defend an ideal of open borders for immigration.⁵⁸⁸ The argument has also been made in the sense that although States have a right to

⁵⁸⁶ See Vonk, Gijsbert (editor), *Cross-Border Welfare State. Immigration, Social Security and Integration*, Social Europe Series, Volume 29, Intersentia, 2012. See also the results of the Conference: Access Denied held at VU University Amsterdam on 13-14 March, 2012, available at www.rechten.vu.nl/accessdenied/

⁵⁸⁷ See <http://picum.org/en/our-work/undocumented-migrants/>

⁵⁸⁸ Political theorist Joseph H. Carens famously defended this position in his 1987 article "Aliens and Citizens: The Case for Open Borders", in *The Review of Politics*, Vol. 49, No. 2, Spring, 1987, pp. 251-273. Although some of his

control their borders, the right to deport those who violate immigration laws is not absolute. Joseph Carens has famously defended that with time, immigrants develop a moral claim to stay. Emphasizing the moral importance of social membership, and drawing on principles widely recognized in liberal democracies, Carens calls for a rolling amnesty that gives unauthorized migrants a path to regularize their status once they have been settled for a significant period of time.⁵⁸⁹ Recently, other authors have argued that the ‘sovereignty thesis’ or the ‘exclusion thesis’ are not strong enough to justify the denial of entrance to ‘normal’ migrants, that is, those who do not fall under other legally recognized categories, such as refugees or stateless persons. Under this position it is submitted that States are the actors who bear the burden of proof of arguing justified reasons for excluding migrants from entering their territory, and not immigrants who have to present justified motives for claiming admission.⁵⁹⁰ Apart from freedom of movement, a broader right to citizenship as members of a political community has been reviewed in the field of social analysis. For instance, recent modes of migrant activism that challenge formal understandings of membership have been explored, such as those of Latin American, especially Mexican, migrants in the U.S. through what has been coined as ‘undocumented citizenship’.⁵⁹¹

On the side of States, some of the concerns raised when human rights of undocumented migrants are brought forth are that this could restrict sovereign immigration powers or be interpreted as a defense of indiscriminate access into national territory. There is then a tension that must be acknowledged between the State’s sovereign powers in immigration control and its obligation of ensuring equality and non-discrimination in the respect and protection of human rights. As Linda Bosniak puts it, how far does sovereignty reach before it must give way to equality?⁵⁹² In this regard, Ruth Rubio Marín and Cristina María Rodríguez have argued that the human rights framework itself may offer the adequate balancing mechanisms to allow for the exercise of State faculties, while at the same time promoting a coherent standard of respect and protection of fundamental human entitlements, central to constitutional democracies -many of them receiving countries of migration. This ‘human rights-sovereignty compromise’ may shed light on ways of confronting the dilemma that anti-irregular immigration measures undoubtedly represents for the idea of universal personhood and human dignity.⁵⁹³

Against the background of the obligation of protection of universal human rights constructed in the post-World War II period as a State-based system, the current ambivalences we face with respect

arguments have changed over time, the central challenge to the legitimacy of border control from a normative stand is still valid. See also Pevnick, Ryan, *Immigration and the constraints of justice: between open borders and absolute sovereignty*, Cambridge, New York, Cambridge University Press, 2011.

⁵⁸⁹ Carens, Joseph, *Immigrants and the Right to Stay*, MIT Press, 2010.

⁵⁹⁰ Schopel, Bas, *On the right of exclusion: law, ethics and immigration policy*, Routledge, New York, 2011. See also Pevnick, Ryan, *Immigration and the constraints of justice: between open borders and absolute sovereignty*, Cambridge, New York, Cambridge University Press, 2011.

⁵⁹¹ See McNevin, Anne, “Undocumented citizens? Shifting grounds of citizenship in Los Angeles”, in Nyers, Peter and Kim Rygiel (editors), *Citizenship, Migrant Activism and the Politics of Movement*, Routledge, 2012, pp.165-183.

⁵⁹² For one of her most recent argumentations, see Bosniak, Linda, “Human rights within one state. Dilemmas of personhood in liberal constitutional thought”, in Dembour, Marie-Bénédicte and Tobias Kelly (editors), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Routledge, New York, 2011, pp. 201-221.

⁵⁹³ See Rodríguez, Cristina María and Ruth Rubio-Marín, “The constitutional status of irregular migrants: testing the boundaries of human rights protection in Spain and the United States”, in Dembour, Marie-Bénédicte and Tobias Kelly (editors), *Are Human Rights for Migrants?*, *ibid.*, pp. 73-98.

to “the transformation of the international norm of sovereignty, already present in the early years of the establishment of the United Nations, pose a challenge to our contemporary world”.⁵⁹⁴

From the perspective of international human rights law, though, we will see throughout this chapter that as a general stand, this framework takes the power of sovereign States to decide who enters and remains in their territory as a given. However, it does at the same time reaffirm that it is not an absolute power and that it must meet a set of criteria in order to be considered legal and legitimate in terms of human rights.

And at this standpoint we encounter a certain paradox of the human rights paradigm: it is based on the will of sovereign States as a *sine qua non* requisite to build legal norms and mechanisms. But this to some extent ties its hands in making pronouncements to the validity and justification of the geographical limitations of the State itself. Despite this, human rights law definitely does have a role to play, as it is submitted in this chapter, when the human cost of borders, entry or residence rules, amounts to life-threatening conditions or to serious injuries to human rights.⁵⁹⁵ The rights to life, personal integrity, health, education, and access to justice, are some of the human rights most at risk in the everyday situations encountered by undocumented migrants, as portrayed in this chapter.

However, in order for human rights law to be able to meet this ‘challenge of the contemporary world’ in a much more effective way, it may need other notions to lean on, given the inherent limitations and blind spots that its own framework presents. Against the background of growing migration flows, a transnational phenomenon by nature that necessarily requires regional or global cooperation to be adequately approached, human security “challenges us to revisit notions of territory and sovereignty as far as they inhibit global action”⁵⁹⁶ to confront such realities.

In that respect, this text will not deal at length with the question of the legitimacy of immigration control as such, but will challenge it insofar as it *severely* and *pervasively* affects or places at risk the human rights of persons and groups forming whole sectors of the population, namely undocumented migrants, and in some cases, particularly women undocumented migrants, constituting a double source of vulnerability. Because of immigration laws and practices, often increasingly restrictive and arbitrary, undocumented migrants frequently experience situations of structural vulnerability, thus meeting the threshold criteria to constitute a human security concern.

IV.2. International human rights law on migrants and non-citizens

This section examines the UN normative framework as the central international parameter for evaluating the compatibility of State laws and policies with human rights standards. Regional

⁵⁹⁴ On the political and legal dilemmas surrounding group membership and individual rights, and their analysis in the 1950s and 60s by Raphael Lemkin and Hannah Arendt against the background of the 1948 Genocide Convention, see Benhabib, Seyla, *Dignity in Adversity. Human Rights in Troubled Times*, Polity Press, Cambridge, 2011, pp. 41-56, particularly p. 56.

⁵⁹⁵ As was mentioned above, such harms to the right to life have been characterized in some cases as a ‘humanitarian crisis’; see the report by the ACLU and the National Human Rights Commission of Mexico, *Humanitarian Crisis: Migrant Deaths at the U.S.-Mexico Border*, 2009.

⁵⁹⁶ Edwards, Alice, “Human security and the rights of refugees: transcending territorial and disciplinary borders”, in *Michigan Journal of International Law*, *op. cit.*, p. 765.

positions are also studied as an important source of the development of international human rights law in this area.

Turning to UN standards, as was mentioned, the current legal framework presents gaps and shortcomings when it comes to migrants. However, important advancements have been made by UN human rights mechanisms in the last ten years and some statements should be drawn as starting points to bear in mind and as a basis for further legal development in this arena:

1) According to International Human Rights Law, based on the rules of *equality and non-discrimination*, in principle migrants have the same rights as any other person under the jurisdiction of the State, given that all human rights and fundamental freedoms should be universally promoted and respected by States without distinction as to race, sex, language or religion (art. 1, 3. and 55 of the Charter of the United Nations).⁵⁹⁷ These general provisions were strengthened through the post-Cold War reaffirmation that “all human rights are universal, indivisible and interdependent and interrelated” (art. 5 of the 1993 Vienna Declaration and Program of Action).⁵⁹⁸ Let us also be reminded that the right to equality coupled with the right to non-discrimination, may translate into not only the negative obligation of the State to abstain from discrimination -either direct or indirect-, but also into positive obligations to take measures to achieve substantive equality, as explained in section II.2.4 on ESC Rights. In this sense, positive equality has also been distinguished from status-based non-discrimination as a separate obligation of the State.⁵⁹⁹

The character of universality of human rights, thus applicable to all persons, and the prohibition of discrimination, especially that which is based on race, would seem to relate directly to the situation of migrants and their enjoyment of rights. The 1948 UDHR⁶⁰⁰ went a step further than the UN Charter and specifically mentioned national origin as one of the prohibited reasons for discrimination when it set forth in article 2 that “*Everyone* is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status”, thereby forbidding States from making differentiations in the recognition of rights on this basis. Thus, nationality, race or ethnic origin, are explicitly prohibited as grounds for distinction. In its decision in *Trimble v. Gordon*, the United States Supreme Court considered that classifications based on national origin were “first cousin” to those based on race; in consequence, they related to areas where it was necessary to apply the principle of equality and equal protection.⁶⁰¹ This also resonates closely to the protection of the rights of undocumented migrants given that, as has been

⁵⁹⁷ Charter of the United Nations, signed on 26 June 1945 in San Francisco, available at <http://www.un.org/en/documents/charter/intro.shtml>

⁵⁹⁸ Vienna Declaration and Program of Action, UN General Assembly, World Conference on Human Rights, A/CONF.157/23, 12 July 1993.

⁵⁹⁹ MacNaughton, Gillian, “Untangling equality and non-discrimination to promote the right to health care for all”, in *Health and Human Rights: an International Journal*, Vol 11, No 2, 2009, available at <http://www.hhrjournal.org/index.php/hhr/article/viewArticle/173/257>

⁶⁰⁰ Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, [General Assembly resolution 217 A \(III\)](#).

⁶⁰¹ Referred to in the submission of Center for Justice and International Law (CEJIL) presented to the IACHR and quoted in the Court’s *AO 18/03, op. cit.*, para. 47, p. 64.

recognized recently by the EU Fundamental Rights Agency, the public reaffirmation and protection of these rights is central to the combat of racism.⁶⁰²

The UDHR also is clear in affirming in Article 6, as mentioned above, that “*Everyone* has the right to recognition *everywhere* as a person before the law”. The right to legal personality seems strongly relevant for undocumented migrants when coupling it with the second part of the article which provides for this right in any place where the person might find her or himself. The situation of invisibility or in some cases, denial by the law -the condition of ‘legal limbo’- often faced by undocumented migrants blatantly violates this provision.

In addition to the omnipresent right of legal personality to be respected and protected by the State of origin or nationality of the person, but by the State where the person is physically situated as well, Article 7 foresees the right of equal protection of the law and non-discrimination when it asserts that “*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*”

In a fascinating historical account of the UN law on migrants’ human rights, Stefanie Grant leaves clear that the intention of the drafters of the UDHR was to cover *all persons*, including aliens. This seems to be confirmed when looking at the universalistic language employed by the UDHR in referring to ‘everyone’ and ‘all’ as the right holders of the entitlements comprised therein. She also traces back these legal developments to various moments, the most recent and arguably the most important being the shift in position by the UN Committee on the Elimination of Racial Discrimination, the treaty body in charge of legal interpretation and supervision of compliance with the ICERD. The Committee moved from its General Recommendation No. 11 of 1993 - which on the basis of exceptions allowed by article 1.2 of ICERD left non-citizens generally outside the protection of the Committee-,⁶⁰³ to later adopt the interpretation of ICERD contained in its General Recommendation No. 30, *Discrimination against Non-Citizens*, of 2004, which affirms the applicability of the Convention to discrimination on the basis of citizenship or immigration status in certain circumstances, as will be analysed more in depth below in the section referring to this Committee. Grant suggests that this interpretation by the Committee was probably influenced by the Durban World Conference on Racism held a few years before in 2001, which signalled undocumented migrants and other non-citizens like asylum seekers as some of the most targeted and affected groups by xenophobic expressions and racial discrimination. The fact is that through the position advanced by General Recommendation No. 30, and defended by the referred author in light of UN history relating to migrants, a door has been opened to debate the need for more protective interpretations that legally cover undocumented migrants and shield them from unjustified differential treatment and abuse.⁶⁰⁴

⁶⁰² See the extensive work being done by the EU Fundamental Rights Agency on the issue of rights of irregular migrants, in particular the report *Fundamental rights of migrants in an irregular situation in the European Union*, 2011, available at http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub-migrants-in-an-irregular-situation_en.htm

⁶⁰³ UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 11: Non-citizens (Art. 1)*, *Gen. Rec. No. 11 (General Comments)*, Contained in document A/46/18, 19 March 1993.

⁶⁰⁴ See Grant, Stefanie, “The recognition of migrants’ rights within the UN human rights system: the first 60 years”, in Dembour, Marie-Bénédicte and Tobias Kelly (editors), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Routledge, 2011, pp. 25-47.

2) A need to reaffirm the original prohibitions of discrimination of the UDHR was expressed in 1985 through the adoption by the UN of the *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live*,⁶⁰⁵ which recognizes the rights of the State to enact laws regarding nationality and citizenship. Article 2.1 makes clear that “Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens”.

However, the Declaration stresses in article 1 that laws and regulations on nationality and citizenship “shall not be incompatible with the international legal obligations of that State, including those in the field of human rights”. It confirms the human rights that should be accorded to all aliens, although admitting certain differentiation as to aliens legally in the territory of the host State with regards mainly to the right to property and the right of association and forming trade unions, which shall be regulated by domestic law. Several provisions of the Declaration also refer to aliens “lawfully residing in the territory” (Articles 5.3 on freedom of movement; Article 5.4 on requirements for family reunification; notably Article 7 on right of non-expulsion except in limited circumstances and with respect to due judicial guarantees; and Article 8 on working conditions, health protection and social security).

Generally speaking, though, the standard set forth in this Declaration of 1985 was further developed in the instruments analysed below and has reached, as of this moment, a higher and more progressive level of protection.

3) The 1966 Covenants, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁶⁰⁶ include relevant provisions for migrants. The ICCPR has been interpreted by its supervision body, the UN Human Rights Committee (HRC), in different instances in relation to migrant persons. Although we may be far away from thinking of a world without borders, it is interesting to note that as early as 1986, the Human Rights Committee, clarified in paragraph 5 of its General Comment No. 15 on *The position of aliens under ICCPR*, that

The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party...However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.⁶⁰⁷

In a right directly relevant for migrant persons usually not (fully) sharing the majority culture of the host State’s population, the ICCPR, through article 27, recognizes the right of individuals belonging to minorities, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. The same

⁶⁰⁵ *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live*, adopted by UN General Assembly resolution 40/144 of 13 December 1985.

⁶⁰⁶ Both instruments adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976. All emphasis in subsequent quotes added.

⁶⁰⁷ UN HRC, General Comment No. 15: *The position of aliens under the Covenant*, CCPR General Comment No. 15. (General Comments), 11 April 1986, para. 5.

provision is included with regards to children members of these minorities in article 30 of the Convention on the Rights of the Child.⁶⁰⁸

In interpreting article 27, the UN Human Rights Committee adopted in 1994 an expansive interpretation and made clear in its General Comment No. 23, *The rights of minorities (Article 27)*,⁶⁰⁹ and clarified that these rights also apply to migrant workers:

Article 27 confers rights on persons belonging to minorities which "exist" in a State party...it is not relevant to determine the degree of permanence that the term "exist" connotes...Just as they need not be nationals or citizens, they need not be permanent residents. Thus, *migrant workers* or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, *to freedom of association, of assembly, and of expression*. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.

One must bear in mind, however, the fragile situation of millions of undocumented migrant workers living in States of all levels of development and income. Because of the vulnerability that legal irregularity entails, as well as the discrimination they frequently encounter, undocumented migrants often face difficulties to explicitly subscribe themselves as members of a community and enjoy their own culture freely and openly.

Under ICCPR, migrants enjoy specific guarantees of due process and review against expulsion measures, including the right to defence and right to legal representation. Article 13 of the ICCPR, though, only includes explicitly "lawful aliens":

An alien *lawfully* in the territory of a State Party to the present Covenant may be *expelled* therefrom only in pursuance of a decision reached in *accordance with law* and shall, except where compelling reasons of national security otherwise require, *be allowed to submit the reasons against his expulsion* and to have his case *reviewed* by, and be *represented* for the purpose before, the *competent authority* or a person or persons especially designated by the competent authority.

However, the obligation of protection towards undocumented migrants may be constructed under the more general ICCPR safeguards of the rights to non-discrimination (article 2), liberty and security of the person (article 9), due process of law (article 14) and equality before the law (article 26); understood as universal human rights as we have seen and, in terms of the Convention, applicable to *all* persons in the territory or under the jurisdiction of the State Party (article 2.1).

The UN HRC, in reviewing compliance with the ICCPR, has also pointed out that once the migrant person is inside the territory of a country, for example, retained within an administrative hostel, he or she deserves protection of the right to liberty and security of the person, especially if

⁶⁰⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, and entered into force 2 September 1990, in accordance with article 49.

⁶⁰⁹ General Comment No. 23: *The rights of minorities (Art. 27)*, 08/04/1994, CCPR/C/21/Rev.1/Add.5, para. 5.2.

the individual is asking for refugee status and may be put into risk by returning to the country of origin.⁶¹⁰

As will be reviewed below, especially in the section of Illustrative legal cases in Chapter IV, the fact that the ECoHR does not include a similar provision to article 13 of ICCPR may explain the limited jurisprudence of the European Court in protecting migrants against expulsion. Right to private and family life, in some cases coupled with the right to non-discrimination, have been argued as defense mechanisms, although they usually cover only regular migrants. Some recent interesting developments, nonetheless, can be found in the field of undocumented migrants and asylum seekers, as will be reviewed in Chapter IV of this thesis.

Regarding the ICESCR, a specific provision allows for a tempering in the binding applicability of the Convention's "economic rights" to non-nationals, in the case of developing countries. Article 2.3 indicates that "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the *economic rights* recognized in the present Covenant to *non-nationals*". In this sense, it has been argued by some authors that if such a distinction is valid relating to non-nationals in general, then when addressing irregular migrants, more so, there is no clear legal human rights' obligation in the field of ESC Rights.⁶¹¹

Independently of the possible difficulties that the qualitative division between developed and developing countries may awaken, a counter-argument to discuss would be that the Covenant only mentions the distinction with relation to economic rights and not all the other social and cultural rights included in this instrument, which would thus remain applicable in all cases. At the same time, the logic behind this provision seems to be that the exception is allowed for developing countries in considering their particularly precarious economic resources and institutional structure, but such exemption is not applicable to developed countries, by reason of their (hypothetical) possibility to guarantee the economic rights foreseen in the Covenant. Of course, in a period like the current economic and financial crisis, developed States may also argue for holding justified reasons to deny or diminish these rights when considering undocumented migrants.⁶¹² As was described above, though, the two general obligations of taking steps to fulfil the minimum core of all ESC Rights and of implementing the Convention observing the right of non-discrimination prevail despite economic downturns or resource constraints. In line with these general duties, as will be seen below, the European Committee on Social Rights and the UN Committee on RMW have concluded there are certain legal obligations in the field of ESC Rights when relating particularly to irregular migrants living in conditions of extreme poverty.

4) There are more recent interpretations, possibly influenced by the entry into force of the UN CRMW in 2003, which will be detailed below. They reaffirm that the rights to equality and non-

⁶¹⁰ See UN HRC, *A. v. Australia*, Communication No 560/1993, CCPR/C/59/D/560/1993, 3 April 1997, paras. 9.2 and 9.4 in relation to 7.2. See also the general evaluations by the Working Group on Arbitrary Detention: Deliberation No. 5 concerning the situation regarding immigrants and asylum-seekers, E/CN.4/2000/4, 2000; Situation regarding immigrants and asylum seekers, E/CN.4/1999/63, 1999; and Situations regarding immigrants and asylum seekers, E/CN.4/1998/44, 1998.

⁶¹¹ See the publication edited by Vonk, Gijsbert (editor), *op. cit.*, for different positions on ESC Rights of undocumented migrants.

⁶¹² In this respect, see the documentation presented concerning the backing away of Spain in 2012 and other European States from measures of social and health benefits in the case of undocumented migrants, when such schemes previously covered all persons, including persons residing irregularly in the country; available at www.picum.org

discrimination should be understood to apply to migrants in relation to all human rights, and also provide criteria on how to realize these principles when exercising territorial sovereignty.

Under the International Convention on the Elimination of Racial Discrimination (ICERD), it is possible to make distinctions, exclusions, restrictions or preferences between citizens and non-citizens (article 1.2), thus seemingly leaving non-citizens outside the protection under the definition of racial discrimination of the Convention (article 1.1). However, while aware of this provision, the Committee on the Elimination of Racial Discrimination (Committee ERD), interpreted in General Recommendation No. 30, *Discrimination against Non-Citizens*, of 2004,⁶¹³ that this distinction “must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights” (para. 2). With this General Recommendation, the Committee shifted from its first position expressed in General Recommendation No. 11 of 1993, which had set forth that Article 1.2 of the ICERD, excepts from the definition of racial discrimination the actions by a State party which differentiate between citizens and non-citizens, and only allowing for the qualification included in Article 1.3 in the sense that among non-citizens, States parties may not discriminate against any particular nationality.⁶¹⁴

In its most recent General Recommendation No. 30 on the subject, though, the Committee demonstrates a less strict approach, more adapted to the exigencies posed by the twenty first century reality of the progressively serious violations experienced by migrants and non-citizens. In its 2004 interpretation of a treaty adopted in 1965, the Committee specifies that its General Recommendation No. 30 replaces General Recommendation No. 11, and makes clear in paragraphs 3 and 4, that:

although...some of these [human] rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, *human rights are, in principle, to be enjoyed by all persons*. States parties are under an obligation to guarantee *equality between citizens and non-citizens* in the enjoyment of these rights to the extent recognized under international law;

Under the Convention, differential treatment based on *citizenship or immigration status* will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are *not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim*.

It is true that in a literal interpretation of Article 1.2 of the ICERD, one could deem that this is not the most orthodox exercise of the Committee’s faculties to determine racial discrimination in cases involving citizenship or immigration status alone, as it is not expressly competent to do so under the treaty. Indeed, in a partly dissenting Individual Opinion in a case before the sister treaty body

⁶¹³ UN Committee on the Elimination of Racial Discrimination, *General Recommendation No.30: Discrimination Against Non Citizens*, (General Comments), available at Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies. Addendum, HRI/GEN/1/Rev.7/Add.1, 4 May 2005.

⁶¹⁴ UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 11, *op. cit.*, para. 1.1. On a defence of the shift by the Committee’s General Recommendation No. 30 in light of the UN history relating to migrants, see also Grant, Stefanie, *op. cit.*

of the UN HRC, Committee Members Nigel Rodley and Martin Scheinin, in the context of explaining the role of the HRC as regards the ICCPR, noted in 2002 that “in its practice the Committee has not addressed distinctions based on *citizenship* from the perspective of race colour, ethnicity or similar notions but as a *self-standing issue* under article 26.2 [of ICCPR]. In our view distinctions based on citizenship fall under the notion of “other status” in article 26 and *not* under any of the grounds of discrimination covered by *article 1, paragraph 1, of the CERD*”.⁶¹⁵

At the same time, it is also true that the clear intention of the Committee on the ERD is to carry out a harmonic and integrated interpretation of the general human rights obligations of equality and non-discrimination contained in the other legal instruments it refers to and that embody principles that inspired the adoption of the ICERD in the first place. While upholding the normative spirit of the prohibitions of discrimination of the Convention and the permitted exceptions of article 1.2, the Committee’s interpretation does not open up a blank check for *any* distinction between citizens and non-citizens/persons with a regular or irregular immigration status, to be considered as measures that would fall under the ICERD’s definition of racial discrimination, but in fact only those *not applied pursuant to a legitimate aim and that are not proportional to the achievement of this aim*, in line with general criteria in the field of non-discrimination law, as reviewed above in this text. The Committee was then cautious enough to phrase the State’s obligations in terms of a non-discrimination duty, not indicating at this point that such obligation would translate into the need to adopt positive measures for attaining full substantial equality between these different social groups.

Therefore, even when admittedly the Committee does exceed the literal sense of article 1.2 in its interpretation, the overall importance of General Recommendation No. 30 as a tool for improved human rights defence may not be disregarded, especially in light of the fact that the current legal framework presents few normative mechanisms that allow for such protection and evidence demonstrates the increasing and critical human rights violations and human insecurity suffered by undocumented migrants and other non-citizens in recent years, as accounted for throughout this chapter. Indeed, this much needed advancement in the legal interpretation of the ICERD is especially relevant for migrants, given the often racialised discourse, policies and laws affecting them, and touches upon the intersectional or cumulative forms of discrimination they often face, more so, in the case of undocumented women migrants, who confront heightened vulnerabilities on account of their gender, as will be studied below.⁶¹⁶ The potential of this interaction between the general human rights of equality and non-discrimination and the recognition of the severe human insecurity undocumented migrants suffer, triggered by General Recommendation No. 30, in turn uncovers one of the *interpretative synergies* relevant for legal analysis as proposed in Chapter V of this thesis.

The practical dimension of the Committee’s interpretation is also revealed in recent facts: in 2008 the Committee concluded the Dominican Republic’s laws, policies and practices on nationality

⁶¹⁵ Individual Opinion by Committee Members Sir Nigel Rodley and Mr. Martin Scheinin (partly dissenting), in UN Human Rights Committee, *Karakurt v. Austria*, Communication No. 965/2000, UN Doc. CCPR/C/74/D/965/2000, 4 Apr. 2002. Emphasis added.

⁶¹⁶ On intersectional discrimination, see Crenshaw, Kimberley, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color”, in *Stanford Law Review*, Vol. 43, July 1991. On the differences between sex as biological and gender as socially built, as well as the construction of gender roles in cultural context, see Charlesworth, Hilary and Christine Chinkin, *The Boundaries of International Law. A Feminist Analysis*, op. cit., pp. 3-4.

and birth registration were discriminatory against Haitians and Dominicans of Haitian origin.⁶¹⁷ Reaffirming not only the more obvious and abstract obligation of non-discrimination based on racial, ethnic or national origin, the Committee also drew the links between the right to nationality and equal access to *citizenship*, and determined that the Dominican Republic was in violation of the ICERD for not making this right accessible to Haitians under its jurisdiction, many of them undocumented migrants, and harming as well the whole spectrum of their human rights from the civil and political arena to their ESC Rights. Such considerations pick up on the Committee's indication in General Recommendation No. 30 that States Parties "[t]ake into consideration that in some cases *denial of citizenship* for long-term or permanent residents could result in creating disadvantages for them in access to employment and social benefits, in violation of ...anti-discrimination principles."⁶¹⁸ The Committee's arguments also build upon the case of the *Yean and Bosico Girls v. the Dominican Republic* by the IACHR, of 2005, dealing precisely with the daughters of undocumented migrants, and reviewed in different parts of this text and commented upon also by other UN treaty bodies, namely, the UN Committee on ESC Rights, as explored in Chapter II above and in the illustrative cases at the end of Chapter IV of this thesis.

Actually, as recently as January 2013 a submission was presented by civil society actors for the Committee's review of the Dominican Republic during its 82nd session concerning equality in the right to nationality as related to the condition of thousands of irregular migrants.⁶¹⁹

5) Another recent development -possibly triggered by the entry into force in 2003 of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families- may be found in General Comment No. 6 of the Committee on the Rights of the Child, *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, of 2005,⁶²⁰ which placed special attention on the rights of migrant children and also provides criteria for better understanding of the principle of non-discrimination. The Committee has indicated that State obligations under the Convention apply to each child within the State's territory and to all children subject to its jurisdiction. Moreover, it reaffirmed that State obligations under the Convention apply within the borders of a State, including with respect to *those children who come under the State's jurisdiction while attempting to enter the country's territory*. Therefore, it noted that the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and *migrant children* - irrespective of their nationality, *immigration status* or statelessness.

Issued only one year after General Recommendation No. 30 of the Committee on ERD, the UN Committee on the Rights of the Child similarly interpreted that

⁶¹⁷ UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Dominican Republic*, UN Doc. CERD/C/DOM/CO/12, May 16, 2008; see para. 14.

⁶¹⁸ UN Committee on the Elimination of Racial Discrimination, *General Recommendation No.30: Discrimination Against Non Citizens*, *op. cit.*, paras. 14-15.

⁶¹⁹ Open Society Justice Initiative / CEJIL, Submission to the Committee on the Elimination of Racial Discrimination: Review of the Dominican Republic, January 2013, available at http://www2.ohchr.org/english/bodies/cerd/docs/ngos/OSJI_Cejil_DominicanRepublic82.pdf

⁶²⁰ UN Committee on the Rights of the Child, General Comment No. 6, *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, paras. 12 and 18. Emphasis added.

The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the *status of a child* as being unaccompanied or separated, or as being a refugee, asylum-seeker or *migrant*. This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of *different protection needs such as those deriving from age and/or gender*. Measures should also be taken to address possible misperceptions and stigmatization of unaccompanied or separated children within the society.

The Committee also clarified that policing or other measures concerning unaccompanied or separated children relating to public order are only permissible where such measures are based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option. It reaffirmed that in order not to violate the prohibition on non-discrimination, such measures can, therefore, never be applied on a group or collective basis, an indication that has unfortunately found violations in recent actions by France concerning collective expulsions of Roma people, as will be further detailed below.

In the same line than the position involving rights of the child, the Committee on ERD had specified that under the Convention, State Parties must “Ensure that public educational institutions are open to non-citizens and *children of undocumented immigrants* residing in the territory of a State party”.⁶²¹

6) Similarly, CEDAW in its General Recommendation No. 26 on *Women Migrant Workers*, of 2008, highlighted the possibility of certain categories of women migrant workers being at risk of abuse, one of such categories being undocumented women migrant workers. The Recommendation aimed “to elaborate the circumstances that contribute to the specific vulnerability of many women migrant workers and their experiences of *sex- and gender-based discrimination* as a cause and consequence of the violations of their human rights”.⁶²² CEDAW emphasized that

While States are entitled to control their borders and regulate migration, they must do so in full compliance with their obligations as parties to the human rights treaties they have ratified or acceded to. That includes the promotion of *safe migration procedures* and the obligation to respect, protect and fulfil the human rights of women throughout the migration cycle. Those obligations must be undertaken in recognition of the social and economic contributions of women migrant workers to their own countries and countries of destination, including through *caregiving and domestic work*.⁶²³

And in a clear echo of the *freedom from fear* and *freedom from want* aspiration of the human security idea, CEDAW underlined how

Undocumented women migrant workers are particularly vulnerable to exploitation and abuse because of their irregular immigration status, which exacerbates their exclusion and the *risk of exploitation*. They may be exploited as forced labour, and their access to

⁶²¹ UN Committee on ERD, General Recommendation No. 30, *op. cit.*, para. 30.

⁶²² CEDAW, General Recommendation No. 26 on *Women Migrant Workers*, CEDAW/C/2009/WP.1/R, adopted on 5 December 2008, para. 2.

⁶²³ *Ibid.*, para. 3.

minimum labour rights may be limited by *fear of denouncement*. They may also face harassment by the police. If they are apprehended, they are usually prosecuted for violations of immigration laws and placed in detention centres, where they are *vulnerable to sexual abuse*, and then deported.⁶²⁴

In its General Recommendation No. 28, *The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, of 2010, CEDAW also recognized that although States primarily exercise territorial jurisdiction, “The obligations of States parties apply, however, without discrimination both to citizens and non-citizens, including *refugees, asylum-seekers, migrant workers and stateless persons*, within their territory or effective control, even if not situated within the territory. States parties are responsible for all their actions affecting human rights, *regardless of whether the affected persons are in their territory*”.⁶²⁵ The reaffirmation of such obligation would also seem to be echoed by the recent case of *Hirsi v Italy*, of 2012, in which the ECHR concluded that Italy’s “push-back” policy of migrants at sea trying to arrive to the country, was in violation of human rights law given that the State had to ensure the right of every migrant for her or his situation to be individually considered, and that this obligation extended to all spaces over which a State party exercises effective control, which may include vessels on the high seas.⁶²⁶

In the same General Recommendation No. 28, CEDAW also highlighted the State’s obligation of designing and implementing a *general policy* on elimination of discrimination against women, under article 2 of the Convention, and specifically addressed migrant women in spelling out that

The policy must identify women within the jurisdiction of the State party (*including non-citizen, migrant, refugee, asylum-seeking and stateless women*) as the rights-bearers, with particular emphasis on the groups of women who are most marginalized and who may suffer from various forms of *intersectional discrimination*.⁶²⁷

This recent reflection of the human security concerns in certain expressions of human rights law pertaining to migrants, more particularly in those directed to women and children, tells us of the potential value of utilizing the concept for advancing broader and more protective interpretations of the scope of human rights and the State’s obligations in relation to migrant persons.

Let us now turn to the human rights instruments specifically dedicated to universal human rights in the context of mobility and how such rights should be applied to persons living or working in countries other than that of their birth or citizenship.

IV.2.1 CRMW and UN Special Rapporteur on the Human Rights of Migrants

Of the whole UN normative human rights structure, one of the nine core human rights treaties refers to migrants, specifically to migrant workers and their families, namely, the International

⁶²⁴ *Ibid.*, para. 22.

⁶²⁵ CEDAW, General Recommendation No. 28, *The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, *op. cit.*, para. 12.

⁶²⁶ ECHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012.

⁶²⁷ CEDAW, *The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, *op. cit.*, para. 26.

Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CRMW), adopted in 1990 and entered into force in 2003.⁶²⁸

The CRMW offers a definition of ‘migrant worker’, thus emphasizing the legal consideration of migration mainly as a situation related to labour. As it has been indicated above, the Convention sets forth in article 2.1, that

The term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

In article 2.2 it goes on to define different types of workers: "frontier worker", "seasonal worker", "seafarer", "worker on an offshore installation", "itinerant worker", "project-tied worker", "specified-employment worker" and "self-employed worker".

To recapitulate what was signalled at the beginning of this chapter, as to the *legal status* of migrants, the CRMW clarifies in article 5 that for the purposes of the Convention, migrant workers and members of their families:

(a) Are considered as *documented* or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;

(b) Are considered as *non-documented* or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.⁶²⁹

Regarding the monitoring of the CRMW in relation to both documented and undocumented migrant workers as defined above, the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (Committee on the RMW) was established in article 72.1 of the CRMW as the body of independent experts in charge of supervising the application of the Convention.

As can be observed, this instrument refers to the rights of *all* migrant workers, that is, documented and undocumented (Part III), on the general basis of the principle of non-discrimination with respect to rights (Part II). The Convention does, however, distinguish a set of additional rights to be recognized to documented migrant workers (Part IV). The UN Convention was drafted based on two prior instruments, the International Labour Organization (ILO) Migration for Employment Convention (Revised) of 1949 (No. 97) and the ILO Migrant Workers (Supplementary Provisions) Convention of 1975 (No. 143), and the three instruments together constitute what has been called the *international charter on migration*, providing a broad normative framework covering the treatment and rights of migrants, as well as inter-State cooperation on regulating migration.⁶³⁰

⁶²⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW), adopted by General Assembly resolution 45/158 of 18 December 1990, entered into force on July 1, 2003. All subsequent references to the CRMW refer to this instrument.

⁶²⁹ CRMW, Article 5, a) and b), emphasis added.

⁶³⁰ Taran, Patrick A., "Clashing worlds: imperative for a rights-based approach to labour migration in the age of globalization", in *Mondialisation, migration et droits de l'homme: le droit international en question/Globalization, migration and human rights: international law under review*, Volume II, under the supervision of Vincent Chetail, Collection of the Geneva Academy of International Humanitarian Law and Human Rights, Bruylant, 2007, p. 421. See also the accompanying Recommendations Nos. 86 and 151 to the ILO Conventions.

The CRMW does not create new rights for migrants, but rather in a similar way to what has been done through human rights treaties referring to other groups (for example, the UN Convention on the Rights of Persons with Disabilities), it specifies how such rights should be understood and applied to migrant workers and members of their families. Indeed, it is the only human rights treaty with universal aspiration that places existing human rights standards in the specific context of migration.

Interestingly enough for the transnational phenomena this instrument deals with, the CRMW provides for a mechanism of inter-State complaints included in article 76, to be presented by one State Party which considers that another State Party is not complying with its obligations under the Convention. This procedure applies only to State Parties who have made a declaration accepting the competence of the Committee in this regard and it will become operative when ten states parties have made the necessary declaration under article 76.2 (at the time of writing only Guatemala had accepted such competence).⁶³¹ In any case, until the time of writing this text, according to information of the UN OHCHR, inter-State complaints had never been applied in the history of human rights treaty bodies' procedures.⁶³²

Similarly to other human rights treaty bodies, such as the ICCPR, the CRMW also contains in article 77 a provision allowing for individual communications to be considered by the CRMW upon express consent of the State Party of such competence of the Committee. In the same way than the inter-State complaints mechanism, these provisions will become operative when ten states parties have made the necessary declaration under article 77.8. At the time of writing only three States, Guatemala, Mexico and Uruguay, had accepted the competence of the Committee in this respect, although Turkey upon its ratification in 2004, made a declaration indicating that it would accept the Committee's competence under both articles 76 and 77 "at a later time".⁶³³

Following the general principles of equality and non-discrimination, the CRMW sets forth in article 7 an *umbrella obligation* of non-discrimination with regards to all human rights:

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

This confirms the position sustained by UN bodies in the previous years to the CRMW, in reaffirming the duty to respect human rights of all migrant workers, regardless of their legal status. Apart from a strict non-discrimination obligation, the Committee on the RMW also affirmed the need for reinforced protective measures when it considered that in cases of extreme poverty and

⁶³¹ See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en#2

⁶³² See <http://www2.ohchr.org/english/bodies/petitions/index.htm#interstate>

⁶³³ See Turkey's Declaration E) regarding articles 76 and 77 upon its ratification of the CRMW on 27 September, 2004, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en#2

vulnerability, State parties are under a duty to provide emergency social assistance to irregular migrant workers and members of their families for as long as they might require it.⁶³⁴

At the same time, it goes without saying that migrant persons hold the general duties that any other citizen does, a general obligation that notwithstanding was specified in the CRMW itself. Article 34 of the Convention states that nothing in Part III of the Convention shall have the effect of relieving migrant workers and members of their families from either the obligation to comply with the laws and regulations of the State of employment and any State of transit or the obligation to respect the cultural identity of the inhabitants of those States. The obligation to comply with the laws and regulations of the State of employment or any State of transit comprises a duty to refrain from any hostile act directed against national security, public order or the rights and freedom of others.

Of course, multicultural, multi-ethnic and multi-religious States present different challenges of their own, independently of, and in some cases including, undocumented migrants. These questions are, however, to be answered within the debate of human rights and democracy, more than within the discussion on multiculturalism, similarity and diversity, inclusion and exclusion of the political community. To place the reflection on migration only in this last framework, risks the often easy passage from what Javier de Lucas calls the “society of indifference” to the “society of disdain” (*sociedad del menosprecio*) and in the more extreme cases to the “society of hatred”.⁶³⁵ Indeed, the indifference of the law towards undocumented migrants or their specific legal exclusion from rights, situates them in a ‘legal limbo’ as portrayed in this thesis, and carries with it a deeper danger. The normalization in everyday life of such legal exclusion leads to social, economic and political segregation of undocumented migrants endorsed or facilitated by the law. It allows for the construction of a group of “second-class” persons, also termed as an “underclass”.⁶³⁶ This inflated emphasis on the “otherness” of migrants and especially of their “otherness in rights” may ultimately channel racial or xenophobic discourse, conducts and policies towards irregular migrants, as duly highlighted by human rights bodies.

To adequately situate the reflection of undocumented migration in the broader field of human rights, let us recall the role of human rights treaties and other rights-based approaches to migration. As the embodiment of the UN human rights standard for migrants and one of the nine core universal human rights instruments, the CRMW is the strongest existing legal parameter to assess the norms and policies adopted by States on the issue of migration. As of the time of writing, the CRMW has been ratified by 46 States, the most recent one being Indonesia on May 31, 2012. The CRMW is of course open for further accessions, which could signal in a positive direction, if we are to take into account that before 1998 only 9 States had ratified the Convention, while from 1998 to 2004 another 18 did,⁶³⁷ and in the last few years the number of State ratifications and accessions has been steadily increasing with two in 2010, one in 2011 and one in

⁶³⁴ See the Committee’s concluding observations, Argentina, 2011 (CRMW/C/ARG/CO/1), para. 30.

⁶³⁵ De Lucas, Javier (editor), *Immigración e integración en la UE: dos retos para el s. XXI*, Eurobask, 2012, pp. 11-13.

⁶³⁶ On the creation of an “underclass” of Third Country Nationals in EU countries caused by the construction and application of EU Law on migration and the inadequacy of anti-discrimination law and policy, as well as insufficient human rights protection by the ECHR, see Jesse, Moritz, “Missing in Action: Effective Protection for Third-Country Nationals from Discrimination under Community Law”, in Guild, Elspeth, Kees Groenendijk and Sergio Carrera (editors), *Illiberal Liberal States. Immigration, Citizenship and Integration in the EU*, Ashgate, Engalnd/USA, 2009, pp. 198-203.

⁶³⁷ Office of the United Nations High Commissioner for Human Rights, “The International Convention on Migrant Workers and its Committee”, Fact Sheet No. 24 (Rev.1), United Nations, New York and Geneva, 2005, p. 3.

2012.⁶³⁸ Still, the CRMW is the human rights treaty with the lowest membership and is far from reaching its goal of universal coverage.

In this respect, the UN OHCHR has signalled that the “low level of ratification reflects persistent *fears or misunderstandings* held by States, particularly destination States, about losing control of migration management. In many countries, these concerns have resulted in and been exacerbated by, an *alarming and visible rise in xenophobic rhetoric in national political discourse*” and highlights ratification of the CRMW as one of OHCHR’s main strategic priorities for 2012-2013.

Within the Member States of the CRMW, one may find mostly countries of origin but also some countries of transit and/or hosting of large numbers of migrants, such as Mexico and Turkey. Among ratifying States, there are countries from all regions of the world, except from the EU. However, 11 Member States of the EU have ratified one or both ILO Conventions which served as basis for the CRMW (Nos. 97 and 143, indicated above) and, at the time of writing, two non-EU European States, Turkey and Albania, are parties to the CRMW.⁶³⁹

The European Parliament has called EU Member States to ratify the CRMW⁶⁴⁰ and the former Secretary General Kofi Annan in 2004 *urged* EU States to become Parties to the CRMW.⁶⁴¹ Nevertheless, until now no EU Member State has ratified nor signed the CRMW. However, it must be noted that for example, Italy based much of its comprehensive national migration law of 1998 on the provisions of the CRMW. In addition, a legal study concluded that Belgian law is almost entirely in conformity with the main provisions of this Convention, which would mean few obstacles to ratification. It should also be noted that Belgium, together with Italy, Spain and Portugal ratified both ILO migrant workers Conventions, which could offer potential roads to ratification of the CRMW.⁶⁴² This should be countered, though, with the many human rights’ concerns raised in relation to the EU Return Directive of 2008,⁶⁴³ concerning the return of migrants ‘illegally staying’ in the territory of Member States, and the legislative and policy amendments it has brought about at the national level by means of the transposition and practical application of the Directive’s provisions.⁶⁴⁴

Thus, the prospects for EU States ratifying the CRMW seem dim at a time of concentrated regional economic integration within the EU; although it remains to be seen what doors may be opened with the entry into force of the EU Charter of Fundamental Rights through the 2009 Lisbon Treaty and its remission to the jurisprudence of the ECHR. This and the heightened political priority granted by the recently founded EU Fundamental Rights Agency to the human

⁶³⁸ See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-13&chapter=4&lang=en#2

⁶³⁹ *Ibidem*.

⁶⁴⁰ European Parliament. 2006. *Resolution on Development and Migration*, Doc. P6_TA (2006) 0319, 6 July 2006.

⁶⁴¹ United Nations Secretary-General Kofi Annan's Address to the European Parliament upon receipt of the Andrei Sakharov Prize for Freedom of Thought (Brussels), January 29, 2004, at http://www.europa-eu-un.org/articles/en/article_3178_en.htm

⁶⁴² See references in Taran, Patrick A., *op. cit.*, p. 423.

⁶⁴³ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *Official Journal of the EU*, L 348/98-107, 24 December 2008.

⁶⁴⁴ See IACHR, Resolution 03/08, “Human rights of migrants, international standards and the Return Directive of the EU”, June 2008. Personal notes taken at the Workshop “Irregular migration in Europe: legal and judicial problems raised by the implementation of the Return Directive”, EUI, 19 October 2012, also give an account of such concerns.

rights of irregular migrants, might point towards interesting approaches that could integrate in one way or another the full understanding of universal human rights of migrants.⁶⁴⁵

Meanwhile, the current UN Special Rapporteur on the Human Rights of Migrants, Mr. Francois Crépeau, has also met the task of supervising implementation of human rights norms covering the whole range of UN Member States, particularly those States not parties to the CRMW. He has currently carried out missions in several Mediterranean countries, among them Tunisia, Italy and Greece, as part of his year-long study on the human rights of migrants at the borders of the EU. Drawing on his experiences of similar visits, he will develop a thematic study which will be presented to the Human Rights Council in June 2013. The study will analyse EU migration management in the context of border management, not only in light of the programmes and policies of the individual States visited, but also considering the overarching EU migration policy framework, focusing on their impact on the human rights of migrants.⁶⁴⁶

IV.2.2 Regional human rights' systems and undocumented migrants

Non-discrimination, equality before the law and equal protection of the law are basic and general principles of law relating to the protection of human rights. Advisory Opinion 18/03 of the IACHR, *Juridical Condition and Rights of Undocumented Migrants* (AO 18/03), reaffirms the highest status of the principle of equality and non-discrimination in concluding that “the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws”.⁶⁴⁷ Thus, the principle of non-discrimination implies that any differences in the treatment meted out to migrants must conform to international law and must not breach migrants' internationally recognized human rights. As an entrance point to analyse the human security-human rights relationship in the context of undocumented migration, let us first review the existing legal framework to determine its limitations and possibilities for pushing forward alternative interpretations.

There have been important regional developments relating to human rights of migrants at the Inter-American level,⁶⁴⁸ and in the African and European landscapes.⁶⁴⁹ This section reviews such regional approaches briefly. A specific mention is warranted, though, of the Inter-American

⁶⁴⁵ For a critical analysis, see Guild, Elspeth, Kees Groenendijk and Sergio Carrera, “Understanding the Contest of Community: Illiberal Practices in the EU?”, in *Illiberal Liberal States. Immigration, Citizenship and Integration in the EU*, *op. cit.*, pp. 1-25.

⁶⁴⁶ See press release “UN Special Rapporteur on the human rights of migrants concludes his third country visit in his regional study on the human rights of migrants at the borders of the European Union: Italy”, Rome, 8 October 2012, at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12640&LangID=E>

⁶⁴⁷ AO 18/03 of the IACHR, *op. cit.*, para. 101.

⁶⁴⁸ As has been indicated, probably the most relevant standard is the Advisory Opinion 18/03 of the Inter-American Court of Human Rights, *Juridical Condition and Rights of Undocumented Migrants*, of 2003, precisely because of its role in clarifying the legal distinctions, if any, in relation to the human rights of documented and undocumented migrants, in particular, migrant workers.

⁶⁴⁹ For an analytical comparison between UN and European instruments, both at the level of European human rights law as well as in EU Law, see Kapuy, Klaus, “European and International Law in Relation to the Social Security of Irregular Migrant Workers”, in *The social security co-ordination between the EU and non-EU countries*, edited by Pieters, Danny and Paul Schoukens, Intersentia, Antwerp, 2009, pp. 115-155. On the African developments related to human mobility and human rights, think for example of the Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa, recently entered into force on 6 December 2012.

framework in this subject, as the only regional standard which examines specifically and at depth the status of undocumented migrants with relation to human rights. Although at the universal level, as has been signalled, the existing legal category for the protection of human rights in the context of migration is that of ‘migrant worker’, at the Inter-American level, AO 18/03 constitutes a legal instrument that protects all undocumented migrants as such in their condition of ‘structural vulnerability’.⁶⁵⁰

Indeed, Advisory Opinion 18/03 of the IACHR should be deemed as an authoritative legal source insofar as it interprets the Inter-American human rights legal framework, basically the 1948 American Declaration on the Rights and Duties of Man and the 1969 American Convention on Human Rights,⁶⁵¹ but also as it analyses European Human Rights Law as a comparative resource, as well as UN human rights law and International Law more generally as binding sources for States in the Americas.

In AO 18/03 the Inter-American Court emphasized, as was briefly mentioned above, that “the fundamental principle of equality and non-discrimination forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*”. This in turn provides for a set of relevant consequences, among others, that ‘the general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory status of a person’. It further concluded that the *migratory status* of a person cannot constitute a justification to deprive him or her of the enjoyment and exercise of human rights, including those of a labor-related nature. When assuming an employment relationship, the migrant acquires rights that must be recognized and ensured because he or she is an employee, irrespective of regular or irregular status in the State where the person is employed. As the Court clarifies, “these rights are a result of the employment relationship”.⁶⁵²

Notably, there is a specific reference to the human security framework as one of the considerations around this AO 18-03, in Concurrent Opinion of Judge Sergio García Ramírez (point 5), who quoted the report *Human Security Now* in referring to the motivations for migratory movements:

In a recent publication, it is recalled that “most individuals migrate in order to improve their living conditions, seek new opportunities or escape poverty”; although we should not overlook other reasons, such as: family reunion, war and other conflicts, human rights violations, expulsion, and discrimination. At the “end of the 20th century, there were an estimated 175 million international migrants, nearly 3% of the world's people and twice the number in 1975. Some 60% of the international migrants, about 104 million, are in developing countries” (Commission on Human Security, *Human Security (sic.)*, New York, 2003, p. 41).

⁶⁵⁰ AO 18/03, *op. cit.*, paras. 112, 113, 130, 131, 149 and 160; see also para. 9 of Reasoned Concurring Opinion of Judge Sergio García Ramírez to AO 18/03, as well as the *amicus curiae* presented by Jorge Bustamante from *Universidad Nacional Autónoma de México* (later UN Special Rapporteur on the Human Rights of Migrants from 2005 to 2011), at p. 81.

⁶⁵¹ American Declaration on the Rights and Duties of Man (ADRDM), Organization of American States (OAS) Res. XXX 1948; American Convention on Human Rights (ACoHR or Pact of San José), OAS Treaty Series no. 36, adopted on 22 November 1969 and entered into force on 18 July 1978.

⁶⁵² AO 18/03, *op. cit.*, at concluding paras. 4, 6 and 8. Emphasis added.

It must also be signalled that AO 18/03 is an expression of a previous regional trend of concern towards migrants' and other non-citizens' human rights. Since its early years, the Inter-American Commission had given particular attention to the situation of refugees in the hemisphere, such as the mass exodus of refugees from the Caribbean in the 1960s, especially after the Cuban Revolution of 1959. Subsequently, the human rights challenges that military dictatorships created in the 1970s throughout the Southern Cone tested the responsiveness of the IACoHR regarding the protection of refugees. During the 1980s, civil wars in Central America posed similar challenges for the Commission. As was referred to above in the section on International Law, risk and vulnerability of this text, the 1984 Cartagena Declaration on Refugees was adopted by several Inter-American States as a result of such challenges.

Relating directly to migrants' rights, in 1996 the IACoHR decided to appoint one of its seven Commissioners as Special Rapporteur on Migrant Workers and their Families as a group in "extreme vulnerability". The Special Rapporteur also participated in the discussion surrounding the request of AO 18/03, as part of a coordinated approach to migrants' human rights between Inter-American Commission and Court. Very recently, in 2012, the IACoHR also determined to broaden the mandate of the Rapporteur, currently Commissioner Felipe González, to also cover "asylum seekers, refugees, complementary protection seekers and beneficiaries, stateless persons, victims of human trafficking, internally displaced persons and other vulnerable groups in the context of human mobility", thereby institutionalizing a tacit practice that in recent years has become part of the Rapporteurship's work on individual petitions, cases, precautionary and provisional measures and thematic and country reports involving such groups.⁶⁵³ This decision also responds to the recognition of the tests posed by internal migration, much higher in numbers than international migration, as referred in the introduction to this chapter, but presenting similar conditions of vulnerability within the specific reality of the Americas. The legal recognition of such vulnerability is also reflected in another regional setting by the recent adoption of the Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa, just entered into force on 6 December 2012, as the only legally binding instrument in the field of IDPs that may thus provoke interesting interpretative standards, potentially enlightening also for future analysis on international migration.

Important is to recall as well that regional human rights instruments contain a substantive protection covering all migrants against *refoulement*⁶⁵⁴ and collective expulsion.⁶⁵⁵ However, most procedural safeguards in individual expulsion proceedings in regional human rights treaties only apply explicitly to "aliens" who are "lawfully" within the territory of a State party.⁶⁵⁶ In comparison to instruments at the UN level reviewed above, we find a similar provision regarding

⁶⁵³ During its first period (1997-2000) Colombian historian Álvaro Tirado was in charge of the Special Rapporteurship. Subsequently, in 2000 the IACoHR designated in the position Argentine jurist and Professor Juan E. Méndez (later appointed UN Rapporteur on the Prevention of genocide). In February 2004, the IACHR appointed Freddy Gutiérrez Trejo, a Venezuelan attorney and professor, as Special Rapporteur. In 2008, the IACoHR appointed the current Rapporteur, Commissioner Felipe González, to a four year term, who now covers these additional groups deemed in need of protection; see <http://www.cidh.org/Migrantes/migrants.background.htm>

⁶⁵⁴ See European Convention on Human Rights, art. 3; American Convention on Human Rights, art. 22, para. 8; African Charter on Human and People's Rights, art. 5.

⁶⁵⁵ See Protocol No. 4 to the European Convention on Human Rights, art. 4; American Convention on Human Rights, art. 22, para. 9; African Charter on Human and People's Rights, art. 12, para. 5; Arab Charter on Human Rights, art. 26, para. 1.

⁶⁵⁶ Protocol No. 7 to the European Convention on Human Rights, art. 1; American Convention on Human Rights, art. 22, para. 6; Arab Charter on Human Rights, art. 26, para. 2; African Charter on Human and People's Rights, art. 12, para. 4.

the right to defence and the right to legal representation foreseen for “lawful aliens” within expulsion proceedings in article 13 of ICCPR. These rights may be expanded, though, to also cover undocumented migrants subject to expulsion procedures, through a harmonious interpretation of the universal rights to non-discrimination, equality before the law, liberty and security of the person, and due process of law, all included in regional instruments, as previously examined.

At the European level, the rights protected in the European Social Charter apply to “foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned”,⁶⁵⁷ or to migrant workers and their families “lawfully within their territories”⁶⁵⁸. A relevant exception is the right to education, which is guaranteed to *all* migrant children, regardless of their migration status, in all regional human rights systems.⁶⁵⁹

On a general stand, the European response to undocumented migrants has been less categorical than the Inter-American. At the normative level, the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms, although not referring specifically to migrants protects them insofar as it is applicable to all persons under the state’s jurisdiction.⁶⁶⁰ The 1961 European Social Charter (ESC) and the 1996 Revised European Social Charter (RESC), afford some degree of protection to undocumented migrants mainly through the right to non-discrimination in relation to different rights such as labour rights and, as was indicated, guarantees of non-expulsion.⁶⁶¹ Also, through the supervision bodies of both instruments, the European Court of Human Rights and the European Committee on Social Rights, respectively, the rights of migrants have to a certain extent been reaffirmed and protected. However, again, the usual approach of the ECHR has been to underline the obligation of States to ensure the right to private and family life (Art. 8) and to non-discrimination (Art. 14) with respect to other rights in relation to non-nationals who are *lawfully* residing in their territory.⁶⁶²

There are some important exceptions, though, to the general stand of only considering lawfully residing migrants in European human rights protection. The European Committee on Social Rights (ECSR), in monitoring Luxembourg’s compliance, has interpreted article 13, paragraph 4, of the European Social Charter as requiring Member States to ensure that all migrant workers, independently of their migration status, are able to access emergency social assistance for as long as they might require it,⁶⁶³ an obligation that was also reaffirmed by the Committee on RMW, as described above.

⁶⁵⁷ See European Social Charter, Appendix.

⁶⁵⁸ European Social Charter, art. 19, paras. 4-9.

⁶⁵⁹ African Charter on Human and People’s Rights, art. 17.1; African Charter on the Rights and Welfare of the Child, art. 11; Protocol No. 1 to the European Convention on Human Rights, art. 2 (read in conjunction with art. 14 of the ECoHR). See also the jurisprudence of the European Committee of Social Rights on art. 17, para. 2, of the Revised European Social Charter and that of the Inter-American Court of Human Rights on art. 19 of the American Convention on Human Rights.

⁶⁶⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECoHR); Article 1.

⁶⁶¹ European Social Charter (ESC); and Revised European Social Charter (RESC); see Articles 18 and 19 of both instruments.

⁶⁶² See for example the cases by the ECHR of *Gaygusuz v. Austria*, Appl. No. 173/71/90, Judgment of 19 September 1996, and *Poirrez v. France*, Appl. No. 40892/98, Judgment of 30 September 2003.

⁶⁶³ See ECSR, Conclusions XIX-2 (Luxembourg), 22 December 2009.

Let us recall, though, that the European Social Charter was adopted in 1961 with a nationality-based reciprocity structure as a foundational feature, and not with the primary aspiration of constituting an instrument embodying universal human rights. In this respect, the interpretations by the ECSR may respond at least partly to the logic of guaranteeing the functioning of a system of mutual benefits, exchanges and trade-offs and not necessarily or as a priority goal to upholding human rights standards. The ECSR has evolved, though, and has moved towards less instrumental and more protective interpretations with a general significance for human rights law, such as that referred to above in reviewing Luxembourg's compliance and explicitly addressing undocumented migrants.⁶⁶⁴

To give but another example of hopeful avenues to more protective positions, reciprocity arguments requiring the conditionality of analogous benefits in place in a first state party to legitimate compliance with the recognition of rights in a second state party, have been rejected by dissenting members of the ECSR itself, reflecting that “the importance of the Charter lies in its multilateral nature, *with no reciprocity condition*. If this principle is breached, its articles concerned with social protection might just as well be repealed”.⁶⁶⁵ Specifically regarding children of migrant workers addressed in the revision of compliance of the UK, one of the dissenting members expressed concern over the majority's interpretation that “states cannot be required to pay child allowances to nationals of States party when there is no corresponding entitlement”; and added that this view was “incompatible with the principle that equal treatment cannot be made subject to exceptions or *reciprocity conditions*”. Further preoccupation was expressed for not moving in line with the more progressive case law of the ECHR (*Gaygusuz v. Austria* and *Poirrez v. France*, referred to above, were quoted) and for considering that the majority interpretation disregarded cases “where dependent children of migrant workers do not live on their territory or have a minimum period of residence or employment requirement which places non-nationals at a disadvantage”.⁶⁶⁶ And in reviewing compliance of the Russian Federation with equal treatment of non-nationals regarding the right to vocational guidance and to vocational training accorded by the Charter (articles 9 and 10), the ECSR *unanimously* affirmed that “length of residence requirements or employment requirements and/or the application of the *reciprocity clause* are contrary to the provisions of the Charter.”⁶⁶⁷ It must be remembered, though, that most of these developments refer to *documented* non-nationals.

In this context, and recalling the standards reviewed in the section on ESC Rights in Chapter II, it is important to keep in mind that even if many migrant workers in an *undocumented* situation do not participate in contributory schemes of social security, they contribute to financing social protection arrangements and programs by paying indirect taxes.⁶⁶⁸

⁶⁶⁴ For an analysis of the ECSR, see Khaliq, Urfan and Robin Churchill, “The European committee of social rights”, in Langford, Malcolm, *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law*, *op. cit.*, pp. 428-452.

⁶⁶⁵ ECSR, Conclusions XVIII-1 (United Kingdom), Articles 1, 5, 6, 12, 13, 16 and 19 of the Charter, 2006; Dissenting opinion by Mr. Jean-Michel Belorgey, joined by Mr. Nikitas Aliprantis, Mrs. Csilla Kollonay-Lehoczky and Mr. Lucien Francois; at first page of the opinion. Emphasis added.

⁶⁶⁶ ECSR, Conclusions XVIII-1 (United Kingdom), Articles 1, 5, 6, 12, 13, 16 and 19 of the Charter, 2006; Dissenting opinion of Mr Tekin Akillioğlu with Conclusion relating to Article 12, para. 4; see last two paragraphs of the opinion.

⁶⁶⁷ ECSR, Conclusions 2012, (Russian Federation), Articles 1, 9, 10, 15, 18, 20 and 24 of the Revised Charter, January 2013, pp. 12-13. Emphasis added.

⁶⁶⁸ See *Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, E/2010/89, 1 June 2010, para. 46.

The cases of alleged human rights violations deriving from expulsion of non-citizens, and for our effects of undocumented migrants, as well as the rules applicable to such expulsions have usually been reviewed by the European Court in terms of violations of the *non-refoulement* principle under Articles 3 (prohibition of torture), or under article 2 (right to life), on the one hand; or in the framework of violations of the right to private and family life on the other, but not in more general terms of respect to the right of due process of law and fair trial. This can possibly also be explained in light of the fact that the ECoHR does not include a mirror provision to that of Article 13 of ICCPR described above (rights of aliens to legal certainty, due process and fair trial when confronting an expulsion decision). The lack of such a provision has left the Court somewhat tied by the hands given it confronts obstacles to review generalized situations of risk and actual violations faced by undocumented migrants in the host State, and when they reach the limit situation of an order of expulsion against them or of actually having been expelled, the Court can only verify if a few minimums were observed.

Even within this parameter, the Court has shown variations in its interpretation of the scope of ‘family’ in the protection of family life, the relevance of language and social ties, and the gravity of the individual’s conduct when weighed against the broader need for public order as a legally justified basis for expulsion.⁶⁶⁹ Regarding concretely undocumented migrants, there are a few cases in which the non-citizen was first residing regularly and then denied renewal of his or her residence permit and was thus undocumented when having experienced the alleged violation. For example, in *Trabelsi v. Germany*, involving a man of Tunisian origin at risk of deportation from Germany and analysed under article 8 of private and family life, the subjective element of human security shows its face, in an account included in the judgment describing the applicant’s “lack of perspective and *insecurity* regarding his future fate and right of residence” when confronting the threat of expulsion to Tunisia.⁶⁷⁰ However, the Court shifted from the position adopted in the previous similar case of *Maslov v. Austria*, of 2008, and concluded in 2011 that in *Trabelsi* there had been no violation by the state, seemingly being supportive or at least permissive of the state’s increasingly restrictive immigration policies, in parallel to similar positions adopted in recent years in all of Western Europe. The recent case of *Kiyutin v. Russia* presents however an interesting turn in terms of migrants’ rights and the possibility of suspending or suppressing an expulsion order on the basis of health reasons (although always argued under article 8 of private and family life), as will be studied below.⁶⁷¹

It is worth noting, though, some interesting developments of the last few years, such as the recent case of *M.S.S. v. Belgium and Greece* by the ECHR as especially illustrative, as will be seen more closely in section IV.4 of this text.

Within the African human rights system, undocumented migrants fall under the general protection of the 1981 African Charter on Human and People’s Rights (ACHPR), which sets forth the obligation of state parties to respect human rights of all persons under their jurisdiction.⁶⁷² In the

⁶⁶⁹ See for example *Dalia v. France*, Application no. 26102/954, judgment of 19 February 1998; *Slivenko et al. v. Latvia*, Application no. 48321/99, judgment of 9 October 2003 (GC); *Maslov v. Austria*, Application no. 1638/03, judgment of 28 May 2008 (GC); *Trabelsi v. Germany*, Application no. 41548/06, judgment of 13 October 2011, (available only in French), para. 23. Emphasis added.

⁶⁷⁰ *Trabelsi v. Germany*, *op.cit.*, para. 23.

⁶⁷¹ *Kiyutin v. Russia*, Application no. 2700/10, Judgment of 10 March 2011.

⁶⁷² See for example African Commission on Human and Peoples’ Rights, *Modise v. Botswana*, communication No. 97/93, decision adopted on 6 November 2000, para. 92, on the extension of the principle of *non refoulement* in cases of risk of torture to also cover protection from cruel, inhuman or degrading treatment (Art. 5 of the ACHPR), an

realm of human security concerns as related to human rights, it is noteworthy to indicate recent evolutions in the African system concerning rights applicable to all women, including *migrant women*, in the form of the ‘right to peace for women’ and the ‘right to food security’, contemplated in the Maputo Protocol to the ACHPR on the Rights of Women, as analysed in Chapter III above.

IV.3 A human security lens to human rights of migrants: legal irregularity as a source of risk

No man in his right senses would voluntarily choose such a life in preference to the one of normal, family, social life which exists in every civilized community.

But there comes a time, as it came in my life, when a man is denied the right to live a normal life, when he can only live the life of an *outlaw* because the government has so decreed *to use the law to impose a state of outlawry upon him*.

Nelson Mandela ⁶⁷³

IV.3.1 The human security/human rights symbiosis as challenging existing boundaries

The spatial and political frontiers that condition respect and enjoyment of people’s human rights seem to be put into question when dealing with situations affecting the rights of irregular migrants. The life-threatening and life-suppressing conditions, as well as the determinants of fear and misery dominating the daily existence of irregular migrants, indeed seem to challenge the boundaries of the political community as constrained to territorial Nation-States as we know them. If we start to take a step back and refrain from taking for granted existing territorial limitations as defining the content of community and the realisation of rights, then certain legal and political concepts such as citizenship start to become blurred, and maybe we can begin to envision concepts such as that of “undocumented citizenship”.⁶⁷⁴

The invisibility affecting irregular migrants -identified as a ‘legal limbo’ in this thesis-, when perpetuated and experienced in a systematic manner, presents even greater risks to social cohesion and the upholding of the principles of the rule of law. This initial expression of indifference may in turn lead to what Javier de Lucas calls the “society of disdain” (*sociedad del menosprecio*), as referred to above. But even more seriously, it has been demonstrated how it may later open the way for mistreatment and ultimately heighten the risk of a “society of hatred” affecting undocumented migrants and other distinct social or ethnic groups.

When looking at the transnational phenomenon of migration, one must also bear in mind the reaffirmation by the human rights bodies at the UN level as well as by ECHR jurisprudence, in the sense that in legal terms each State is individually responsible for its own actions, even if it carries

extension which would also be applicable to migrant persons. The Kampala Convention for the Protection and Assistance of Internally Displaced Persons (IDPs) in Africa, entered recently into force on 6 December 2012, is also to be recalled as the only regional legally binding instrument in the field, as mentioned above.

⁶⁷³ Excerpted from Mandela, Nelson, *Long Walk to Freedom*, Boston: Little, Brown & Co., 1994.

⁶⁷⁴ McNevin, Anne, “Undocumented citizens? Shifting grounds of citizenship in Los Angeles”, *op. cit.*

them out as part of a joint partnership with other States or as a result of an implementation measure of a resolution of another international body, for example, the UN Security Council.⁶⁷⁵ In this sense, in the case of *Hirsi v. Italy*, the ECHR condemned the practice of “push-backs” at sea by Italy mainly of migrants arriving from Libya, even when such a practice was partly based on a bilateral agreement between the two countries that allowed for this.⁶⁷⁶

However, one wonders if this is sufficient in dealing with the protection and guarantee of the rights of irregular migrants. This would seem to bring us back to the debate on the duty of international cooperation wrapped into Article 28 of the UDHR, on the right of everyone to a social and international order in which human rights can be fully realized, as discussed in section II.2.2 above on Human security and human rights in Public International Law. As I argued there, human security can be said to embody a modern materialization of such right, complementing existing proposals on the contemporary realisation of the right to development and other forms of assessing broader and contextual global economic inequalities and the legal, political and procedural structures that render them possible.⁶⁷⁷

To place migrants’ human rights within such discussion, we can summarize by recalling that various human rights’ treaty bodies have increasingly and also consistently (considering especially the last ten years), reaffirmed the applicability of human rights standards to migrant persons and the prohibition of discrimination based on national origin or immigration status. They have paid particular attention to the situation of migrant women and children and have emphasized the obligation of States, unless specified otherwise in the treaties, to facilitate the accession and enjoyment by all migrants -documented and undocumented-, to all human rights -civil, political, economic, social and cultural.

Indeed, as Pia Oberoi puts it, “in placing primary emphasis on the individual, both the human rights and the human security framework challenge the dominant discourse prevalent in migration policy-making today, which asserts that the principle of sovereignty accords states an ascendant position, able ultimately to privilege state security over the ‘human security’ of migrants.”⁶⁷⁸

Thus, in speaking of the rights of migrants, the departing point in the debate is not –as it often is purported- the national sovereignty of States and their ability to regulate territorial borders, but rather what the law, or different legal systems, have to say about such rights and the principles that ground them. Indeed, the UN Special Rapporteur on the Human Rights of Migrants, Mr. François Crépeau, has very recently highlighted the tendency observed in some declarations by public officials and the mass media to consider that migrants who arrive to States and have not been

⁶⁷⁵ In the recent case of *Nada v Switzerland* the ECHR found -taking into account the previous decision of the UN Human Rights Committee in *Sayadi and Vinck v. Belgium*- that while the applicant’s listing by the Sanctions Committee of the UNSC was attributable to the UN, the implementation of the sanctions by Switzerland was attributable to Switzerland itself; see paras. 88-92 and 121-122 of *Nada v. Switzerland (GC)*, Appl. no. 10593/08, 12 September 2012, as well as UN Human Rights Committee, *Sayadi and Vinck v. Belgium*, communication no. 1472/200622, October 2008; both cases concerning measures –transit or travel bans, among others- imposed or applied by States (Switzerland and Italy on the one hand, and Belgium in the second case), pursuant to the implementation of UN Security Council’s resolutions based the listing made by its Sanction Committee and legal provisions adopted thereby domestically.

⁶⁷⁶ See ECHR, *Hirsi v. Italy*, *op. cit.*

⁶⁷⁷ See Curtis, Josh and Shane Darcy, *op. cit.*, pp. 34-35.

⁶⁷⁸ Oberoi, Pia, “Empowering migrants: human security, human rights and policy”, in Edwards, Alice and Carla Ferstman (editors), *Human Security and Non-Citizens: Law, Policy and International Affairs*, *op. cit.*, p. 270.

invited to come or to enter, somehow do not enjoy the same rights as the rest of the people. Such pattern has led to the creation of spaces of administrative discretion based on an undercurrent belief that there exist two kinds of human rights, those held by citizens and those of a *second-class category*, deserved by non-citizens. It must be underlined though, as he clarified, that International Law is firm in laying down that all human rights are to be enjoyed by all human beings, with the only exceptions allowed by International Human Rights Law itself.⁶⁷⁹ International Law has been constructed, at least partly, precisely through the progressive understanding of State sovereignty as involving the responsibility of ensuring a series of values and living conditions for the persons under the State's jurisdiction, *qua* persons with dignity, as a sufficient reason for the legal recognition and enjoyment of a set of rights.⁶⁸⁰ In that sense, the first affirmation that would have to be signalled is that universal human rights are, in principle, and with few exceptions, applicable to *all migrants*, regular and irregular.

At the same time, though, universal human rights of migrants are met with some barriers within International Law itself and with numerous obstacles at the domestic level, as will be evidenced in the following sections. As Ryszard Cholewinski puts it, the difficult plight of migrant workers in many countries of the world to secure their basic human and labour rights, “and their limited access to legal remedies both in law and in practice, often exacerbated by their non-citizen and/or unauthorized status, reveals a substantive gulf between ‘rethoric and reality’ in guaranteeing these rights to all persons”.⁶⁸¹

Facing the existing gaps in international and domestic law, the human security approach may in fact contribute to reinforce the central starting point in thinking about undocumented migrants: “You do not need a visa or a residence permit to qualify for human rights. Simply being born is your passport to human rights protection”.⁶⁸²

IV.3.2 Immigration measures and testimonies by undocumented migrants

At the level of empirical evidence, multiple sources provide for shocking accounts of the extreme vulnerability experienced by undocumented migrants at the border and more generally as the

⁶⁷⁹ Statements by F. Crépeau at the debate *The Management of the External Borders of the EU and its Impact on the Human Rights of Migrants: The Italian Experience. A Consultation between the UN Special Rapporteur on the Human Rights of Migrants, Mr François Crépeau, Civil Society, and Academia*, organised by the Migration Policy Centre, Robert Schuman Centre for Advanced Studies of the European University Institute (EUI), with the support of the Open Society Foundations, and held at the EUI in Florence, Italy on October 3, 2012. Personal record taken. See also press release “UN Special Rapporteur on the human rights of migrants concludes his third country visit in his regional study on the human rights of migrants at the borders of the European Union: Italy”, Rome, 8 October 2012, at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12640&LangID=E>

⁶⁸⁰ In this sense, see Cassese, Antonio, *International Law*, Oxford, Oxford University Press, second edition, 2005, p. 45. See also Teitel, Ruti G., *Humanity's Law*, Oxford University Press, 2011, p. 192; and her analysis of the “human security turn” to global justice at pp. 139-164. For a discussion that can be applied also to undocumented migrants, see Teitel's reference to Hannah Arendt's right to have access to rights and thus to belonging to an organized community as a basis for emphasizing the tendency towards global solidarity by current international law, p. 209.

⁶⁸¹ Cholewinski, Ryszard, “Labour migration management and the rights of migrant workers”, in *Human Security and Non-Citizens: Law, Policy and International Affairs*, *op. cit.*, p. 275.

⁶⁸² Speech by Morten Kjaerum, Director, European Union Agency for Fundamental Rights (FRA), “Dignity and rights of irregular migrants”, 4th Fundamental Rights Conference, Warsaw, Poland, 21-22 November 2011, p. 2, underlined in original. Available at <http://fra.europa.eu/fraWebsite/attachments/MK-Speech-FRC-NOV2011.pdf>

“uninvited” members of society.⁶⁸³ The factual accounts of the human insecurity suffered by undocumented migrants are numerous and frequently reveal racial prejudice and xenophobic expressions. To draw a representative picture, this text looks at some symbolic cases. In the face of these cases, the government responses of many of the receiving countries that are otherwise defensive of the human rights discourse and practice -such as EU Member States like Italy and Greece, as well as policy-makers at the European level more generally-, are preoccupying for being “deeply corrosive of respect for universal human rights”.⁶⁸⁴

Of course, responsibility is also to be set on sending and transit countries in contributing to the human insecurity that drives people away in the first place or not adequately protecting them from risks during the migration journey. At the level of bilateral, regional and international understandings that are necessarily called for facing a transnational phenomenon, surely these challenges are best met through an outlook and strategy of “shared responsibility”. However, this text focuses mainly on the constructed vulnerability and human insecurity that the lack of a legal immigration status produces for migrant persons, who often suffer human rights violations as a result. At the productive and more creative side, the thesis also proposes ways in which the human security conception can work together with human rights law to better identify these risks and formulate approaches to better prevent, confront and alleviate them.

In looking at the human security-human rights relationship in this subject, as was anticipated above, two main situations can be distinguished: 1) undocumented migrants at the border: deaths at the “fault-line”; 2) the risks to human rights of undocumented migrants once in the territory of the receiving State. Specific threats stemming from the gender dimension of undocumented migration can also be identified in both settings. Particular risks are also associated to the situation of undocumented women migrant domestic workers. Because of the differentiated and disproportionate impact that the risks affecting undocumented persons represents for women and girls, and especially considering the specific threats they face in light of Chapter III above on VAW, this issue merits separate consideration, also in line with the approach adopted by human rights bodies, as addressed below.

Indeed, the geographical borders also draw the lines that shape the experience of the migrant in her or his journey through different physical spaces and jurisdictions. In some cases, these lines can signify the difference between life and death, on the one hand, or on the other, between a life with dignity or one filled with fear, as illustrated below.

⁶⁸³ See Harding, Jeremy, *Border Vigils: Keeping Migrants out of the Rich World*, Verso Books, London, New York, 2012, where he revisits and updates his previous book *The Uninvited: Refugees at the Rich Man's Gate*, Profile Books, London Review of Books, London, 2000.

⁶⁸⁴ See Human Rights Watch, *World Report 2012. Events of 2011*, p. 44.

1) Undocumented migrants at the border: deaths at the “fault line”⁶⁸⁵

The empirical accounts of the human insecurity experienced by undocumented migrants are varied and this section provides but some examples of the magnitude of the human dimension of the risks experienced throughout the migration journey.

To start with the North American region comprised by Canada, the U.S. and Mexico, let us bring to light that the border-crossing of persons from Mexico to the U.S. and the risks associated to it is so critical that it has been categorized as ‘a humanitarian crisis’.⁶⁸⁶ People often lose their lives through drowning in the Mexico-U.S. bordering river, the Río Grande, dying from dehydration or hypothermia in crossing the Arizona desert, or by cause of different type of abuses from human smugglers, risks that have increased in the last five years.⁶⁸⁷ Estimates indicate that almost 400 persons die each year trying to cross the Mexican-U.S. border,⁶⁸⁸ placing the figure at 2,219 deaths between January 2006 and March 2012.⁶⁸⁹ Notably, while immigration from Mexico to the U.S. has registered a decrease between 2005 and 2011 -especially since 2008 possibly due to the economic crisis in the U.S.-, due to increasingly harsh U.S. immigration and security policy and growing violence at the border, the number of deaths has remained the same and the search for new crossing routes and the dangers associated to the crossing itself have intensified. Indeed, “while overall migration has decreased, for those who attempt the trip, the *probability of death* from exposure on U.S. soil has *increased sharply*”.⁶⁹⁰

Since before this situation had reached its current gravity for crossing migrants, a historical account describing the social attitudes and official policies towards immigrants in general in late

⁶⁸⁵ The term “migratory fault lines” has been used to describe migratory flows triggered by economic disparities between neighboring States; see UN Commission on Human Rights, “Report on the Human Rights of Migrants submitted by the Special Rapporteur of the Commission on Human Rights”, A/59/377, 22 September 2004, para. 7. The flows take place across land and sea borders where migratory pressures are most acute because they divide States with very different standards of living. Stefanie Grant proposes this concept as a useful way of thinking about individual protection needs and also about “the wider asymmetries in human development, *human security* and human rights which drive irregular migration”. She identifies three fault lines: the land border between Mexico and the U.S., the maritime borders between North Africa and Southern Europe, and those between the Horn of Africa and the Southern Arabian peninsula, of which I examine mainly the first two. I follow her in the use of this term to frame the analysis of the reviewed risks faced by migrants; Grant, Stefanie, “Irregular migration and frontier deaths. Acknowledging a right to identity”, in Dembour, *op. cit.*, p. 49. Emphasis added.

⁶⁸⁶ See the report by the ACLU and the independent public body, the National Human Rights Commission of Mexico, *Humanitarian Crisis: Migrant Deaths at the U.S.-Mexico Border*, 2009.

⁶⁸⁷ Peña, Alex, “Migrants face higher risks illegally crossing the border”, in NBC Latino, 20 September 2012, <http://nbc-latino.com/2012/09/20/migrants-face-higher-risks-illegally-crossing-the-border/>. The author bases his account on the study *Beyond the Border Buildup: Security and Migrants Along the U.S.-Mexico Border*, by Adam Isacson and Maureen Meyer, Washington Office on Latin America (WOLA)/El Colegio de la Frontera Norte, April 2012.

⁶⁸⁸ Figures from the Mexican Ministry of Foreign Affairs and US Border Patrol authorities, quoted in *Beyond the Border Buildup: Security and Migrants Along the U.S.-Mexico Border*, *op. cit.*, p. 40.

⁶⁸⁹ *Ibid.* See also García, Judith, “Cada 24 horas muere un mexicano al querer pasar a EU ilegalmente: SRE”, in *El Sol de México*, 5 August 2012, available at <http://www.oem.com.mx/elsoldemexico/notas/n2645139.htm>

⁶⁹⁰ *Beyond the Border Buildup: Security and Migrants Along the U.S.-Mexico Border*, *op. cit.*, pp. 9-13. Quote from p. 41. Emphasis added. The report explains the link between the National Strategy of the Border Patrol that adopted the “prevention through deterrence” approach: to impede, through fences and containment operations, the crossing of undocumented migrants. These border enforcement operations are thus directed at moving migrants towards remote and inhospitable areas of the border, in an attempt to deter them from crossing. This has actually happened, but at the expense of the migrants who do decide to cross: because of the increased risks of crossing, the number of deaths has not diminished, pp. 14 and 40.

nineteenth and twentieth-century U.S., had revealed their political construction as “unwelcome strangers”.⁶⁹¹ Moreover, the conditions experienced by undocumented migrants had already been termed as them being “strangers to the Constitution”, in referring to their exclusion from enjoyment of fundamental rights.⁶⁹²

On the southern side of the Mexican border, the circumstances are not more favourable. Central American migrants mainly from Guatemala, Nicaragua, El Salvador and Honduras, who attempt to cross the Mexican border by train usually to transit through the country in their path towards the U.S., confront severe life-threatening conditions throughout their journey. There are myriad accounts of their vulnerability to accidents in the train at the southern border popularly referred to as “*La Bestia*” (“The Beast”) that have caused amputations of body parts and deaths.⁶⁹³ The attempts of migrants to cross the border and the subsequent travel have been categorized as “hell”,⁶⁹⁴ a “route of danger”⁶⁹⁵ and an experience of “terror”.⁶⁹⁶ Civil society reports, UN and Inter-American sources and the independent public body of the Mexican National Human Rights Commission highlight how migrants have also recently become victims of various crimes, including kidnapping, extortion, rape and murder, by the hand of smugglers or organized crime, mainly drug-trafficking, during their crossing and transit in Mexico, at times with complicity or participation of State officials, a situation that has increased dramatically in the last few years placing the figure of kidnapped migrants in Mexico at a shocking more than 20,000 between 2008 and 2011.⁶⁹⁷ Paradoxically, this has come to being partly due to a transformation of criminal organizations as a response to the government’s firm stance against drug cartels (adopted since

⁶⁹¹ See Reimners, David M., *Unwelcome Strangers. American Identity and the Turn Against Immigration*, Columbia University Press, New York, 1998.

⁶⁹² See Neuman, Gerald L., *Strangers to the Constitution: immigrants, borders, and fundamental law*, Princeton, N.J., Princeton University Press, 1996.

⁶⁹³ See *La Bestia*, the documentary on the plight of Central American migrants trying to enter Mexico by train through the southern border usually to transit through the country in their path to the US, available at <http://www.eluniversal.com.mx/notas/736080.html> Other visual sources depicting the realities of irregular migrants have been carried out; to cite one of the most recent, see the web-documentary by PICUM on irregular migrants called *Undocumentary*, available at www.undocumentary.org; and the film *Terraferma*, on the situation faced by North African migrants attempting to reach Italy by sea and the conditions of the detention centers in which they are frequently placed.

⁶⁹⁴ Vega, Arturo, “El infierno de los inmigrantes centroamericanos”, *Periódico El Universal*, lunes 10 de enero de 2011, Ciudad de México, available at <http://www.eluniversal.com.mx/notas/736080.html>

⁶⁹⁵ Dudley, Stephen, “Parte III: La Ruta del Peligro”, in *Insight Crime. Crimen Organizado en las Américas*, 28 November 2012, available at <http://es.insightcrime.org/investigaciones/migrantes-centroamerica-mexico>

⁶⁹⁶ Godoy, Emilio, “México, escala de terror para inmigrantes centroamericanos”, 28 abril 2012, available at <http://ipsnoticias.net/nota.asp?idnews=95272>

⁶⁹⁷ National Human Rights Commission of Mexico (CNDH): *Informe Especial sobre los Casos de Secuestro en Contra de Migrantes*, 2009, and the follow-up *Informe Especial sobre Secuestro de Migrantes en México*, February 2011, available at <http://www.cndh.org.mx/node/35>; Jorge Bustamante, Report of the UN Special Rapporteur on the Human Rights of Migrants to the UN Human Rights Council, A/HRC/7/12, 25 February 2008; Meyer, Maureen with contributions from Stephanie Brewer, *A Dangerous Journey through Mexico: Human Rights Violations against Migrants in Transit*, WOLA and Centro Prodh, December 2010, available at http://www.wola.org/publications/a_dangerous_journey_through_mexico_human_rights_violations_against_migrants_in_transit. The two CNDH reports account for 9,758 migrants kidnapped in Mexico between September 2008 and February 2009, of which 9,194 were kidnapped by organized gangs; and 11,333 migrants kidnapped between April and September 2010. Of these, 76 percent were from Central America and 10.6 percent were from Mexico. The figures have been somewhat disputed by government officials, but these are the only wholesome reports carried out so far on this subject at the national level, and there is general consensus in the fact that risks for migrants have augmented severely. See also Amnesty International, *Culpables conocidos, víctimas ignoradas. Tortura y maltrato en México*, (Índice: AMR 41/063/2012), 2012, “Abusos Contra Migrantes”, p. 11 and cases at p. 13.

2006), which have then resorted to targeting migrants as a source of blackmail and income, or penetrated the business of human smuggling or human trafficking.⁶⁹⁸ At the same time, due to the lack of or inadequacy of institutional response in the face of such situations, and the consequent obstacles to the right of access of justice of abused migrants and their families, their vulnerability to violence and crime and the resulting impunity has been categorized as leaving “invisible victims”,⁶⁹⁹ in a situation of double victimization as categorized below: the violation of one of their human rights (e.g. to life, to personal integrity, or right of women to live free from violence), and the subsequent violation of their right of access to justice.

On the other side of the Atlantic, regarding the attempts of people to reach Europe from Northern Africa, the account is not less critical. A recent report by Human Rights Watch gives the account of the number of migrant deaths in the Mediterranean (many of them presumably from Tunisia), a sea with many busy shipping lanes where international law and centuries of custom oblige ships to assist those in need. Based on data by the United Nations High Commissioner for Refugees (UNHCR), it estimates that 1,500 people died in the Mediterranean in 2011 alone, making it the deadliest year on record. ‘Fortress Europe’, an internet blog that tracks deaths of those seeking to reach Europe, puts the number at over 2,000. The real number may be even higher. Political upheaval and armed conflict in North Africa in 2011 created particular circumstances that may have led to more people embarking on even more dangerous crossings. Yet, migration to Europe by those fleeing persecution or just seeking a better life is a regular, yearly phenomenon, and so too are deaths at sea. According to the NGO Fortress Europe, over 13,500 people have died attempting these crossings since 1998.⁷⁰⁰

Against this background, the UN Special Rapporteur on the human rights of migrants, François Crépeau, has recently called on the EU to develop a migration mechanism (Mobility Partnership) with Tunisia which goes beyond strict security issues and concentrates on the respect, protection and promotion of the human rights of migrants. He emphasized that in these types of partnerships (also offered to Egypt and Morocco), the EU focuses on issues of border control, and does not consider important matters such as ‘the facilitation of regular migration channels’. On the other hand, in an exercise of balanced survey, Special Rapporteur Crépeau also stated that Tunisia has been criminalising irregular border crossings, thus contravening the right to leave one’s country. Mr. Crépeau has undertaken a year-long study of the management of the EU’s external borders in relation to the human rights of migrants which will result in a special thematic report to be

⁶⁹⁸ One of the most serious cases that provides evidence of this shift is the kidnapping in August 2010 by the organized criminal gang *Los Zetas* of 72 undocumented migrants in the northeast Mexican state of Tamaulipas, who were later found killed in a clandestine grave; see IACoHR, Annex to Press Release 82/11, “Preliminary Observations of the IACHR’s Rapporteurship on the Rights of Migrant Workers on its Visit to Mexico”, August 2, 2011, available at

<http://www.cidh.oas.org/pdf%20files/IACHRPreliminaryObservations%20Mexico2011.pdf><http://www.cidh.oas.org/pdf%20files/IACHRPreliminaryObservations%20Mexico2011.pdf> One of the presumed responsible was arrested by Mexican authorities in October 2012, see Gómora, Doris, “Cae presunto autor de muerte de 72 migrantes en Tamaulipas”, in *El Universal*, 8 October 2012.

⁶⁹⁹ See Amnesty International, *Víctimas invisibles. Migrantes en movimiento en México*, 28 April 2010.

⁷⁰⁰ See Human Rights Watch, *Hidden Emergency: Migrant Deaths in the Mediterranean*, by Judith Sunderland, Human Rights in Europe, August 2012. See also the analysis in Scheinin, Martin, in collaboration with Ciaran Burke and Alexandre Skander Galand, *Rescue at sea: human rights obligations of states and private actors, with a focus on the EU’s external borders*, RSCAS Policy Paper 2012/05, Robert Schuman Centre for Advanced Studies, Global Governance Program, European University Institute, Florence, 2012.

presented to the UN Human Rights Council in June 2013.⁷⁰¹ Indeed, these risks are common also in other North African countries, such as Libya, as will be seen in the next section.

2) Risks to human rights of undocumented migrants once in the territory of the receiving State

The risks and actual human rights violations that undocumented migrants encounter in the receiving States in the realms of access to health, personal integrity, social protection measures, labour conditions, housing and food, are myriad and often particularly heightened in the case of women and girls.⁷⁰²

Apart from policies, there are also restrictive laws which have enhanced vulnerability of migrants and deepened their human insecurity -in the case of a federal system even in an asymmetric manner within one same country. An example is the recent Alabama Immigrant Act, or “Beason-Hammon Act”, entered into force on September 28, 2011. A Human Rights Watch report noted that only in the first two months that the law was in effect, “local officials have used it to deny unauthorized immigrants access to everyday necessities such as water and housing in violation of their basic rights. The law also denies all unauthorized immigrants fundamental rights protections that should apply to everyone, not just citizens, making them *more susceptible to discriminatory harassment* and abuse by local authorities and ordinary people. They live in a *climate of fear and uncertainty*, which has had a particularly severe impact on children”.⁷⁰³

Similarly, the Support Our Law Enforcement and Safe Neighborhoods Act, referred to as “Arizona SB 1070”, which was analysed recently by the US Supreme Court, has been accused of facilitating racist profiling. The SB1070 is considered to be the strictest anti-irregular immigration measure in the US legislative history. The US Supreme Court considered the constitutionality of the law, widely denounced as being racist and its judgment is likely to set the direction of immigration law in America for years to come. In Arizona, where the Hispanic population reaches 41%, tensions between residents and the police increase a little more each day. Indeed, two specific clauses of the law encourage the police to be more proactive. They can for example, control the identity of anyone coming their way, should they suspect this person of being irregularly on the territory. As a result, the number of Hispanics sent to jail because they were unable to produce their driver’s license is constantly on the rise. With more than 30 men and women deported each day, the city of Phoenix has one of the highest deportation rates of the country.⁷⁰⁴

Indeed, these cases have not been left without judicial review, although the outcomes have not always been supportive of immigrants’ rights. On June 25, 2012 the US Supreme Court overturned three out of four provisions of the anti-immigration law Arizona SB 1070, arguing that such powers rested with the federal government. The Justices blocked parts of Arizona’s SB 1070 that would have made it a state crime for irregular immigrants to seek work or not to carry documents.

⁷⁰¹ UN News Centre, “EU should see beyond border control regarding Tunisia migrants – UN expert”, UN News Service, June 12, 2012, available at <http://www.un.org/apps/news/story.asp?NewsID=42207&Cr=tunisia&Cr1=>

⁷⁰² See the 2011 Report of the UN Special Rapporteur on Violence Against Women, *op. cit.*; and Vonk, Gijsbert (editor), *Cross-Border Welfare State. Immigration, Social Security and Integration*, *op. cit.*

⁷⁰³ Human Rights Watch, *No Way to Live. Alabama’s Immigrant Law*, United States, Human Rights Watch, 2011, quote from backcover. Emphasis added.

⁷⁰⁴ *The Guardian*, 24 April 2012, referred to in PICUM Bulletin of 9 May, 2012.

The Court's decision appears to give states such as Arizona quite a limited role in enforcing laws against irregular immigrants. Police departments can notify federal agents if they have a suspect in custody, but they cannot keep the suspect in a county jail on simply on state immigration charges. However, the Supreme Court upheld the contentious section 2B, better known as “show me your papers”. This provision requires the police to check the immigration status of anyone they stop before releasing them. This law and five other similar laws in other states in the US are at present being legally challenged by civil rights’ organizations. Taking into account the gender dimension of applying this type of laws, several women’s rights organizations highlight that women immigrants are making enormous social and economic contributions in US communities and consider that laws like Arizona SB 1070 ignore this reality and reflect ‘a broken system that leaves women in the shadows’. Also, with the Dream Act⁷⁰⁵ only applying to the young, a considerable part of the undocumented community remains at risk of being deported, as well as families being separated based on the different immigration status of each of their members.⁷⁰⁶

In the United States, risks of violations of human rights of migrants, especially undocumented migrants and asylum seekers, and the abuses themselves (including rape, trafficking and other forms of serious violence) have revealed such a severe nature that Human Rights Watch conducted extensive research and analysis on the subject, and issued eleven in-depth reports from 2009 to 2011 alone.⁷⁰⁷ Against this background, migrants have not remained passive and have carried out

⁷⁰⁵ The original purpose of the Development, Relief and Education of Alien Minors Act (DREAM Act), proposed for the first time in 2001, was to help those individuals who meet certain requirements, have an opportunity to enlist in the military or go to college and have a path to citizenship which they otherwise would not have without this legislation. This applies for example to undocumented immigrant students who have been living in the U.S. since they were young; see <http://www.dreamact2009.org/>. However, since the Dream Act has not been successfully approved by Congress yet, on June 15, 2012, President Barack Obama announced that his administration would stop deporting young illegal immigrants who match certain criteria previously proposed under the Dream Act, see “Obama administration to stop deporting some young illegal immigrants”, June 16, 2012, available at http://edition.cnn.com/2012/06/15/politics/immigration/index.html?hpt=hp_t1

⁷⁰⁶ See “In Arizona, cheers and disillusionment follow immigration ruling”, in *Los Angeles Times*, June 25, 2012, available at <http://www.latimes.com/news/nation/nationnow/la-na-nn-supreme-court-immigration-arizona-20120625.0,1865769.story>; and PICUM Bulletin — 11 July 2012, PICUM (Platform for International Cooperation on Undocumented Migrants), available at <http://picum.org/en/news/bulletins/35405/>

⁷⁰⁷ All of the following reports have been issued and published by Human Rights Watch: *No Way to Live: Alabama’s Immigrant Law*, December 14, 2011, <http://www.hrw.org/reports/2011/12/14/no-way-live>; *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, June 14, 2011, <http://www.hrw.org/reports/2011/06/14/costly-move-0>; *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, August, 25, 2010, <http://www.hrw.org/reports/2010/08/25/detained-and-risk-0>; *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System*, July 25, 2010, <http://www.hrw.org/reports/2010/07/26/deportation-default-0>; “Tough, Fair, and Practical”: *A Human Rights Framework for Immigration Reform in the United States*, July 8, 2010, <http://www.hrw.org/reports/2010/07/09/tough-fair-and-practical-0>; *Costly and Unfair: Flaws in US Immigration Detention Policy*, May 6, 2010, <http://www.hrw.org/reports/2010/05/06/costly-and-unfair-0>; *Jailing Refugees: Arbitrary Detention of Refugees in the US Who Fail to Adjust to Permanent Resident Status*, December 29, 2009, <http://www.hrw.org/reports/2009/12/29/jailing-refugees-0>; *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, December 2, 2009, <http://www.hrw.org/reports/2009/12/02/locked-far-away-0>; Human Rights Watch, et al., *Returned to Risk: Deportation of HIV Positive Migrants*, September 29, 2009, <http://www.hrw.org/reports/2009/09/24/returned-risk-0>; *United States - Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses*, April, 15, 2009, <http://www.hrw.org/reports/2009/04/15/forced-apart-numbers-0>; *Detained and Dismissed: Women’s Struggles to Obtain Health Care in United States Immigration Detention*, March 17, 2009, <http://www.hrw.org/reports/2009/03/16/detained-and-dismissed-0>.

different actions and strategies to claim their rights and gain empowerment.⁷⁰⁸ Still, the clandestine situation of undocumented migrants shadows their experiences and often deters their approach to formal mechanisms of justice and redress.

In the case of North Africa, similar accounts may be found. The report *"We Are Foreigners, We Have No Rights": The Plight of Refugees, Asylum-Seekers and Migrants in Libya* gives testimony to the atmosphere of lawlessness, racism and xenophobia, faced by undocumented foreign nationals in Libya, and worsened in the post-Gaddafi era. Undocumented non-citizens are at *continuous risk* of exploitation, arbitrary and indefinite detention in harsh conditions, as well as beatings, sometimes amounting to torture.⁷⁰⁹ Analogous conditions met by Ethiopian irregular migrants in Yemen are also accounted for as "desperate choices" between staying in their country of origin in a situation of poverty and lack of opportunities, or taking the journey to attempt a better life under serious risks to their physical integrity and basic labour rights if they do so.⁷¹⁰

Similarly, in another African case involving undocumented migrants but with a clearly differentiated gender impact, a recent report by Human Rights Watch describes an alarming pattern of human rights violations by members of Angolan security forces against Congolese migrants. Women and girls, who are often detained with their children, have been victims of sexual abuse including gang rape, sexual exploitation, and being forced to witness sexual abuse of other women and girls. Beatings, degrading and inhumane treatment, arbitrary arrests, and denial of due process have been common practices during roundups of undocumented migrants, and in custody before their deportation. Human Rights Watch interviewed more than 100 victims and witnesses to abuses, during expulsions from the Cabinda enclave and the diamond-rich Lunda Norte province to the Congolese provinces of Bas-Congo and Kasai-Occidental in 2009 and 2011. Most of those migrants enter Angola to work in alluvial diamond mines or in informal markets.⁷¹¹ With such empirical evidence in mind, the heightened risks faced by undocumented migrant women and girls will be addressed in detail in the corresponding section below.

Let us now turn to the outlook on the normative challenges to these factual realities and examine the positions and strategies taken by human rights mechanisms, civil society and legal scholarship to confront them.

IV.3.3 Universality, vulnerability and responses by human rights actors

As has been signalled, migration across borders is an archetypical transnational phenomenon open to human security scrutiny. This poses questions as to the ways to better meet human rights

⁷⁰⁸ See for example Gordon, Jennifer, *Suburban Sweatshops: The Fight for Immigrant Rights*, Belknap/Harvard University Press, USA, 2005, a fascinating work that reconstructs the legal plight of undocumented Mexican migrant workers in New York City in the struggle to claim their rights.

⁷⁰⁹ Amnesty International, *"We Are Foreigners, We Have No Rights": The Plight of Refugees, Asylum-Seekers and Migrants in Libya*, November 2012 (emphasis added), based on fact-finding visits to Libya between May and September 2012, see <http://www.amnesty.org/en/news/libya-foreign-nationals-face-abuse-and-exploitation-2012-11-13>

⁷¹⁰ See Danish Refugee Council (Regional Office for the Horn of Africa & Yemen)/Regional Mixed Migration Secretariat (RMMS), *Desperate choices: conditions, risks & protection failures affecting Ethiopian migrants in Yemen*, *op. cit.*

⁷¹¹ Human Rights Watch, *"If You Come Back We Will Kill You": Sexual Violence and Other Abuses Against Congolese Migrants During Expulsions from Angola*, 2012, available at <http://www.hrw.org/>

obligations related to migrant persons, based on the existing legal standards reviewed in section IV.2 above. However, as such standards are designed to be applied mainly by national governments at the State level, it becomes necessary to also think of creative interpretative methods to enhance such rights in the face of trans-border challenges.

Apart from the first-stance right of freedom of movement regarding migrants' rights (*ius migrationis/ius peregrinandi*), the common understanding would seem to be that there are two different rights that converge when thinking of people who move from their country of origin or nationality: the right to enter another country and the rights recognized to persons once they are in the territory of the host State, considered through the dichotomy nationals/non-nationals, non-citizens or foreigners (depending on the legal-political categorization). However, it is submitted that actually these alleged two rights are both sides of the same coin when viewed in terms of human rights. As some authors have noted, although different in content, the right to enter has, in the last instance, the same fundament than the right to be treated in a dignified manner once the person is inside, given that the first is the logical presupposition for the second. Thus, the limits of the *ius peregrinandi* really depend on the collision between rights of the "foreigner" and rights of the "national".⁷¹² As Luigi Ferrajoli has also highlighted, in analyzing inclusion/exclusion, foreignness is precisely the only exclusive category left alive today in many legal systems.⁷¹³

Looking at the international legal framework, in a world in which we now have constructed a sufficiently solid legal architecture reaffirming human rights of all persons mainly through State obligations, it would seem that the rights of migrant persons ought to be protected according to certain criteria -physical proximity, residence, or efforts and degrees of social integration-, but that in any case the question is more about the distribution of obligations than about the existence and applicability of such rights.

As was mentioned above, the universal paradigm guiding human rights principles sustains that all persons are equal in dignity and rights, and will thus not be discriminated against on the basis of sex, gender, religion, culture, language, ethnicity, or national origin. However, the universality of human rights seems to be put into doubt when facing the conditions of migrant persons. Indeed, "despite the theoretical universality of human rights law, in reality characteristics such as nationality or formal legal status can significantly affect the extent of rights an individual is actually accorded".⁷¹⁴

Actually, in many contexts, the strict enforcement of immigration law has resulted in a deterring effect on crime reporting: at the risk of being deported undocumented migrants stop reporting crimes and prefer to go unnoticed. This has led to the weakening of trust bonds that local authorities, especially local police, need to adequately maintain social cohesion and advance

⁷¹² Köpcke, Ma. Isabel, "La nueva Tierra Prometida": Derechos morales del inmigrante frente a la sociedad de acogida", en *Migraciones económicas masivas y derechos del hombre*, J.M. Bosch Editor, ESADE, Facultad de Derecho, Barcelona, 2002, p. 253.

⁷¹³ See Ferrajoli, Luigi, *Derechos y garantías. La ley del más débil*, Italian-Spanish translation by P. Andrés Ibañez and A. Greppi, Trotta, Barcelona, 1999, especially Chapter 4. See also Brown, Garret W., "The Laws of Hospitality, Asylum Seekers and Cosmopolitan Right: A Kantian Response to Derrida", in *European Journal of Political Theory*, Vol 9 (3), 2010.

⁷¹⁴ McAdam, Jane, *Complementary Protection in International Refugee Law*, Oxford Monographs in International Law, Oxford University Press, 2007, p. 12. See also more generally Añón, María José (editor), *La universalidad de los derechos sociales: el reto de la inmigración*, Tirant lo Blanch, Valencia, Spain, 2004; and Solanes Corella, Ángeles (editor), *Derechos humanos, migraciones y diversidad*, Tirant lo Blanch, Valencia, Spain, 2010.

public order and thus has further enhanced what has been termed ‘community insecurity’.⁷¹⁵ This would seem to echo other concerns regarding the detrimental effect on human rights of the increasingly severe application of immigration restrictions, which may and does leave persons outside the law or invisible to the law,⁷¹⁶ and therefore in a condition of vulnerability. Paradoxically, the strict and often arbitrary application of certain laws, in the form of administrative (and increasingly criminal) immigration regulations, seems to be hindering the effective implementation of human rights law, with respect to sizeable sectors of the population, namely undocumented migrants.

The irregular character of their entry or residence in a given State would seem to extend at times to the whole realm of the human experience of undocumented migrants. In addition, the perceived threat posed by increased migration and population mobility, both within and across borders, is often presented as a critical situation where respect for human rights is seen as an additional luxury because undocumented migrants are considered to enjoy or deserve diminished human rights protection. These conditions tend to place undocumented migrants in a certain ‘*legal limbo*’, void of rights or the possibility of accessing them. This is particularly true of detention centres where migrants are forced to reside while their legal situation is determined. In this respect, human security has been defended as a relevant tool for arguing in favour of moving “from rights-free zones to rights-fulfilling States”.⁷¹⁷

Many European States have adopted in recent years provisions that criminalize certain aspects of irregular immigration, not clearly differentiating clandestine entrance and residency, with the internationally recognized crimes of smuggling of persons and human trafficking. In any case, what does seem clear is that, partly due to pressure by EU institutions, we are in presence of what some authors have critically called “the administrativization of criminal law”,⁷¹⁸ referring to the surrender of a juridical-criminal institution to administrative goals external to criminal law. In this

⁷¹⁵ See Center for Human Rights and Global Justice, *A Decade Lost: Locating Gender in U.S. Counter-Terrorism*, NYU School of Law, New York, 2011, p. 102.

⁷¹⁶ See for example Düvell, Franck and Bastian Vollmer, *European Security Challenges*, EU-US Immigration Systems 2011/07, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, 2011.

⁷¹⁷ Human Rights Ahead, “What Next for Human Rights?” Working Paper. A Reflection on the 60th Anniversary of the Universal Declaration of Human Rights, Human Rights Ahead, Spain, December 2008, available at <http://www.hrahead.org/our-agenda/promoting-human-security>.

⁷¹⁸ Cancio Meliá, Manuel (Professor of Criminal Law) and Mario Maraver Gómez (Assistant Professor of Criminal Law) at Universidad Autónoma de Madrid, “El derecho penal español ante la inmigración: un estudio político-criminal”, in Bacigalupo/Cancio Meliá (editors), *Derecho penal y política transnacional*, editorial Atelier, Barcelona, 2005, pp. 343-415 (reference from p. 398; all translations are my own). The authors refer to this term employed by other scholars analyzing the legal reforms of 1995 and especially of 2003 in Spain that prioritized expulsion –with very few possibilities of right to defense– as a criminal sanction for foreigners without legal residence who had committed certain criminal offences. However, Cancio Meliá and Maraver Gómez do not necessarily agree that this is a clear case of ‘administrativization of criminal law’ (*administrativización del derecho penal*), but rather signal the contradictions of the Spanish legal system in this respect and argue that they can be better explained through a logic of ‘criminal law of the enemy’ (*derecho penal del enemigo*) using the term proposed by Jakobs especially in reference to anti-terrorism laws (pp. 386-404). This type of legal order is characterized by the anticipation of the punitive barriers; the disproportion in legal consequences; the elimination of due process guarantees, and as the authors add, it also fulfills the function of identification of a category of persons as *enemies* that therefore focuses on the author as member of a group, rather than on the criminal action as such. Thus, a ‘criminal law of the enemy’ adopts a combative position towards imaginary or possible future enemies, and is directed rather than to speaking to its citizens, to threatening its enemies, pp. 404 and 408.

case, migration policy goals seem to have crept into criminal law which has traditionally been regarded as *ultima ratio* and not as an instrument to reach public policy objectives.

The heightened condition of vulnerability of asylum seekers and refugees against this background has recently been highlighted by the UN High Commissioner for Refugees, Mr. António Guterres, who denounced politicians and leaders using the anxiety over the economic downturn as an excuse to blame foreigners and scapegoat minorities, and emphasized that “refugees are not a security threat, but rather *the first victims of insecurity*.”⁷¹⁹ This state of vulnerability has also been analysed academically from the perspective of a possible protection crisis being facilitated by the economic crisis.⁷²⁰

However, less scholarly and judicial attention has focused on the more general issue of the risks faced by undocumented migrants or persons with a temporal undefined legal status. Some countries themselves have however started to express concern for the vulnerable situation of migrants. As an illustrative example, the “security of migrants and ethnic minorities” was indicated by Finland’s own Internal Security Programme of May 2008 as one of the key issues to be paid special attention to in the following years.⁷²¹ Efforts to analyse these issues are being made and the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (UN Committee RMW) plays a fundamental role in shedding light on such vulnerabilities and clarifying the concrete ways in which human rights of all migrant workers, documented and undocumented, and members of their families should be understood and applied, as was already reviewed in detail.

To provide another representative example of the reactions provoked by migrants’ precarious situation in the U.S. and the human rights violations they face, at times dramatic as illustrated in the previous section, the response by academia and civil society is worth mentioning. In a similar exercise to the 2011 *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, referred to in the previous section on ESC Rights, members of academia and social and human rights organizations adopted also in 2011 a set of principles -in this case specifically addressing non-citizens-, the *Boston Principles on the Economic, Social and Cultural Rights of Noncitizens*.⁷²² Focusing attention on ESC Rights, rather than on the dominant US tradition of civil and political rights, the Boston Principles are 30 standards drawn from international human rights, humanitarian, and migration-related treaties, guidelines, and other statements of best practice as well as recommendations by U.S.-based civil society.⁷²³ Specifically

⁷¹⁹ “Leaders Celebrate Anniversaries of Conventions on Refugees and Statelessness”, *The Global Herald*, By News Desk; published on Wed, 07 Dec 2011, available at <http://theglobalherald.com/leaders-celebrate-anniversaries-of-conventions-on-refugees-and-statelessness/26122/> Emphasis added.

⁷²⁰ In this respect, see for example Chetail, Vincent and Celine Bauloz, *The European Union and the Challenges of Forced Migration: From Economic Crisis to Protection Crisis?*, *op. cit.*

⁷²¹ Quoted in ECHR, *N. v. Finland*, *op. cit.*, para. 311.

⁷²² *The Boston Principles on the Economic, Social and Cultural Rights of Noncitizens* (“The Boston Principles”), May 1, 2011, Annotated Version, available at <http://www.northeastern.edu/law/pdfs/academics/phrge-principles-long.pdf>; see also Lewis, Hope and Rachel E. Rosenbloom, “The Boston Principles: an Introduction”, in *Notre Dame Journal of International, Comparative and Human Rights Law*, 1, 2011, pp. 145-156.

⁷²³ An early draft was launched at a gathering of lawyers, human rights and immigrants’ rights advocates, scholars, students, and community organizers held at Northeastern University School of Law, Boston, Massachusetts on October 14-15, 2010. The meeting was co-sponsored by the Program on Human Rights and the Global Economy (PHRGE), the Human Rights Interest Group of the American Society of International Law, and the Ford Foundation. After incorporating comments from meeting participants, a second draft was launched for public comment on

based on challenging the invocation of ‘national security’ as a legitimation by US federal, state and local officials to tighten immigration measures and limit immigrants’ rights, the Principles include several articulations of rights interesting for the purposes of this thesis.

Applying a cross-cutting and integrated perspective, the Boston Principles build on recent developments in International Human Rights Law and reaffirm the general principles of equality and non-discrimination towards all non-citizens regardless of immigration status (Principles 1 and 2), combining them with specific State obligations regarding rights of non-citizens, particularly children (Principles 22, 23 and 25), women at risk of gender-based discrimination and violence (Principle 26), members of minorities or indigenous peoples (Principle 24), persons with disabilities (Principles 27 and 28), and asylum seekers or refugees (Principle 29).⁷²⁴ In a similar line to the position of this thesis, the Principles reaffirm the rights of access to justice and accountability (Principles 7 and 8), and the rights to an adequate standard of living, decent work, education, health, social security and family life of all non-citizens, documented and undocumented (Principles 9, 10, 19, 20-22).

As standards especially affecting the situation of undocumented migrants, the Principles signal State obligations to respect core human rights at stake in immigration proceedings and enforcement actions. Recognizing deportation as one of the most severe sanctions a government can carry out, it calls for residence in the US and family ties to be given due consideration in any proceeding that may result in such measure (Principle 5). In a principle echoing the IACHR’s Advisory Opinion 18/03, *Juridical Condition and Rights of Undocumented Migrants*, the Boston Principles also remind us that deportation shall not be resorted to for the purpose of depriving a noncitizen worker of the employment rights arising out of the authorization of residence and the work permit, nor in retaliation for the exercise of workers’ rights or for seeking the protection of other human rights (Principle 18).

In adopting a human security-sensitive lens, the Principles include “the right to access public benefits *without fear*” (Principle 6). Notably, they also set forth the right of non-citizens to seek asylum and enlist an additional criterion to the traditional ones in laying down their right to be protected against forcible return to or resettlement in any place where the non-citizen’s life, safety, liberty *and/or health* would be at risk, which seems to direct us towards the reflections on the *Case of N. v. UK* by the ECHR, presented below in section IV.4 of this text. In a standard that would reduce undocumented migrants’ human insecurity and sense of fear, the Principles go one step further and recognize a right of all non-citizens and members of their families, *including those who entered the country irregularly*, to pursue citizenship according to due process of law and in accordance with their human rights (Principle 29).

The Principles are also clear in stating that “Immigration laws, policy and enforcement must not be discriminatory in *intent or effect*. Measures taken for *national security* must be *free of discrimination* and must *ensure* that noncitizens are *not subjected* to racial, ethnic, or religious profiling or stereotyping (Principle 30). Cognisant of the interrelated risks that such justifications

December 10, 2010, International Human Rights Day. See <http://www.northeastern.edu/law/academics/institutes/phrge/publications/boston-principles.html>

⁷²⁴ The Principles were discussed within the Institute of Human Rights “Beyond National Security: Immigrant Communities and Economic, Social and Cultural Rights” held in Northeastern University School of Law on October 14-15, 2010; see the resulting Report with the same name published by the Program on Global Economy and Human Rights of Northeastern University School of Law, May, 15, 2012.

entail for overall human security, the annotated version of Principle 30 clarifies that “The *systematic* violation of human rights undermines national security and public order and *itself* jeopardizes international and domestic peace and security”.⁷²⁵

IV.3.4 Undocumented female migrants: girls, women and workers at risk

Some of the limits and lacunae of International Law addressing undocumented migrants are especially identifiable when applying a gendered human security focus.⁷²⁶ Certain of these shortcomings have fortunately been placed as a priority consideration by the relevant UN Committee on the Rights of Migrant Workers and Members of their Families, as well as by other human rights bodies, as will be described below.

The sphere of violence against women, analysed in Chapter III of this thesis, dramatically finds its way into the context of migration, causing women and girls to suffer discrimination and human rights violations on at least two accounts, their gender and their status as undocumented migrants. Within this context, the case of human smuggling and more notably that of human trafficking of women, to some extent represent a border-line case between gender-based violence and migration. This is especially true in looking at the phenomenon of human trafficking of women and girls for purposes of sexual exploitation.

Although this thesis does not deal directly with human smuggling and human trafficking, which enjoy their own international legal regime as has been mentioned, and exceed the scope of this work, just to provide an illustrative contextual background, suffice it to say that according to the Drug and Crime Report of 2010 by the UN Office of Drugs and Crime (ODC), revenues from human smuggling Latin American undocumented people into Mexico reach some US\$1 billion per year.⁷²⁷ On the side of human trafficking, syndicates and the use of forced labor generate as much

⁷²⁵ The Boston Principles, *op. cit.*, Understanding C. of Principle 30, “Impact of Human Rights Violations on Security”.

⁷²⁶ On these gaps and flaws, see Mullally, Siobhán, “Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?”, in *International and Comparative Law Quarterly*, no. 60, 2011, pp. 459-484; Fudge, Judy, “Decent Work for Migrant Care Workers”, at ‘Gender and Migration: Workers at the Interface of Migration and Development’, a special panel event by the United Nations Entity for Gender Equality and Women’s Empowerment (UN Women) and the International Labour Organization (ILO) at the Fourth United Nations Conference on the Least Developed Countries (LDC-IV), May 2011, available at: http://www.ilo.org/global/meetings-and-events/events/conference-on-least-developed-countries/WCMS_155339/lang--en/index.htm. See also Resnik, Judith, *Migrations and Mobilities: Citizenship, Borders, and Gender* (co-edited with Seyla Benhabib), NYU Press, New York, 2009. For a study on the levels of legal protection and the socio-juridical differences between Moroccan women residing abroad and immigrant women in Morocco, as well as the legal condition of the “left behinds” –the women who stay behind in the country of origin once “their men” have migrated, see Elmadmad, Khadija, *Femmes, Migrations et Droits au Maroc*, CARIM Notes d’analyse et de synthèse 2011/01, Série sur genre et migration/Module juridique, Institut Universitaire Européen, Robert Schuman Center for Advanced Studies, 2011.

⁷²⁷ United Nations Office of Drugs and Crime, *Drug and Crime Report*, United Nations, Austria, 2010, p. 66, available at http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf. It must also be signaled that anti-trafficking policies often enclose a broader migration policy as the overall intention, many times reflecting nationalistic or conservative agendas. As Stephanie Limoncelli has argued in studying the history of anti-trafficking measures before WWII and the action of the feminist liberal movement of the International Abolitionist Federation (IAF), what started as a well-meaning, feminist attempt on the part of IAF to protect women and girls from sex trafficking across global, racial, or ethnic lines became dominated by the International Bureau for the Suppression of the White Slave Traffic that had aligned itself with State actors whose main concerns were with nationalistic worries about migration and controlling undesirable migrants in particular. In doing so, the “purity reformers” of the

as \$32 billion a year globally - almost a third of that in Asia. Labor and crime analysts forecast that profit could reach over \$100 billion within the next half decade.⁷²⁸ Against this setting of an immensely profitable activity, let us only underline that women suffer gendered and disproportionate effects of the phenomenon of human trafficking and its legal regulation, which have been studied academically regarding their relation to human rights, and strategy proposals to address trafficking from a gendered perspective have also been put forward by feminist scholars.⁷²⁹ Human trafficking has started to be considered as well by human rights scholars and judicial bodies, as well as by different regional institutions as an issue of growing concern.⁷³⁰ Part of the concern lies in the perceived danger that human rights may be marginalized through excessive emphasis on State sovereignty and security and criminalization of migration-related activities, a preoccupation that would not seem out of place if we take into account the high degree of ratifications and rapid entry into force of both the smuggling and the trafficking protocols (three and four years respectively since the adoption of the Palermo Convention), in contrast to the twelve year *vacatio legis* and the relatively low number of ratifications of the UN CRMW, the archetypical human rights treaty dealing with migration.

Other gendered implications of migration are reflected in the different forms of violence against undocumented female migrants as well as undocumented domestic workers, which will be reviewed in further detail as directly related to the human rights and human security of irregular migrant women and girls. In applying a gendered human security lens as articulated in Chapter III, to the condition of women migrant domestic workers, it has to be noted that the spectrum of discrimination, exploitation and human rights violations experienced by such workers is at times promoted by International Law itself. The architecture of International Human Rights Law, allowing from exceptions in the application of labour and social security standards, partly supporting the traditional private/public divide, and permitting the imposition of migration restrictions, as reviewed in section IV.2 above, do not deeply challenge this continuum.

International Bureau ended up reinforcing State control over women's mobility and sexual labor. Where feminists in the IAF wanted to protect women from men, supporters of the International Bureau ended up working to "protect" the State from the women. In this respect, the author demonstrates that regulating women's mobility and sexuality has usually been to the detriment of women themselves. Still today governments continue to use anti-trafficking measures as migration control since their concern is with State interests, not the interest of individual women; see Limoncelli, Stephanie A., *The Politics of Trafficking: The First International Movement to Combat the Sexual Exploitation of Women*, Stanford University Press, Palo Alto, 2010.

⁷²⁸ Data presented by Noeleen Heyzer, UN Under-Secretary General and Executive Secretary of the UN Economic and Social Commission for Asia and the Pacific (UNESCAP), in the launching of a global campaign in 2011 to involve the business sector in combating human trafficking, available at <http://www.voanews.com/content/un-urges-business-to-fight-human-trafficking-126183048/142825.html>

⁷²⁹ See for example 'third-way' feminists who propose a model of *sociolegal interventions*, such as microcredit, civil remedies, caseworker privileges, that either contribute to preventing trafficking or to assist trafficked women to access other life choices. These interventions are seen as third-way feminist ones because they address the sources of gendered power imbalances, without imposing a unitary outcome on women, and they are consistent with the capabilities approach because they build a woman's social capital and actually increase the possibilities available to her; see Cavalieri, Shelley, "Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work", in *Indiana Law Journal*, Volume 86, 2011, pp. 1409-1458.

⁷³⁰ See for example the case by the ECHR, *Rantsev v. Cyprus and Russia*, Appl. No. 25965/04, 7 January 2010. Also, the IACoHR has broadened the mandate of its Special Rapporteur on Human Rights of Migrants to also consider trafficked persons. For an academic analysis, see Anne Gallagher, Anne, "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis", in *Human Rights Quarterly*, Volume 23, Number 4, November 2001, pp. 975-1004.

Similarly, the recently adopted ILO Convention Concerning Decent Work for Domestic Workers, otherwise an important advancement, excludes from the applicability of the Convention persons who perform domestic work only occasionally or sporadically and not on an occupational basis (article 1.c) and permits State Parties to exclude wholly or partly from its scope “limited categories of workers in respect of which special problems of a substantial nature arise” (article 2.2b)).⁷³¹ In this context, the recourse to private means to meet the demand for certain lines of work, and the recruitment of migrant domestic workers to meet “care deficits”, not only evidence a retreat from the Welfare State, but also fail to pose broader questions on how to value and maintain care work.

The centrality of caring values and care functions for the sustainment of life has been analysed by feminist authors in relation to human security against the background of the gendered political economy of contemporary globalisation, as mentioned in Chapter III. In this respect, it has been argued that a critical, feminist ethics of care can provide a comprehensive ontological and normative framework for integrating economic exclusion with violence, and thus for conceptualising human security in a way that is sensitive to the role played by gender identities and other types of power relations.⁷³²

In this context, the care deficit experienced several European Welfare States, especially in Southern Europe, is particularly relevant for migrant female workers. Indeed, the demand for domestic and other workers to carry out care functions, often finds the side of supply in migrant women. Although there is an identifiable demand-supply relationship, due to economic austerity and frequent fears for social and political cohesion running along (often post-colonial) ethnic and racial lines, the strains on a harsher State immigration policy have become stronger, shaping the construction of a “transnational political economy of care”.⁷³³ As a result, European State policy has recently overlooked or denied the existence of such an economic relationship, closing the legal channels for safe migration routes to access the territory of demanding States and the care labour market, and thus prompting the entrance of migrants, especially women, through irregular means to the host State and creating spaces for them to live and work in an undocumented manner.⁷³⁴ Again, this “legal limbo” in turn places migrant women in an exposed position to labour exploitation, abuse and violence, with the differentiated gender dimension this involves. As many of the rest of the so called “low-skilled” migrants, as well as the broad category of undocumented migrants, most women leave from a State where they experience poverty and exclusion, to move within a market that wants and needs migrants, but doesn’t welcome them, in turn facing a State that offers few avenues to defend, protect and guarantee their rights. Indeed, human insecurity is

⁷³¹ ILO Convention 189, Convention Concerning Decent Work For Domestic Workers, adopted by the General Conference of the International Labour Organization at its 100th session, 16 June 2011.

⁷³² Robinson, Fiona, “The Importance of Care in the Theory and Practice of Human Security”, in *Journal of International Political Theory*, Volume 4, No. 2, 2008, pp. 167-188. As was pointed out above, the author argues however that a human rights-based approach to human security does not sufficiently take into account the relevance of relations of care, caring values and care activities for the maintenance of long-term human security.

⁷³³ See Williams, Fiona, “Towards a Transnational Analysis of the Political Economy of Care”, SULCIS Working Papers, Stockholm University Linnaeus Center for Integration Studies – SULCIS / Scandinavian Working Papers on Economics, WP No. 2011:6, 9 August 2011.

⁷³⁴ Summary presented by Siobhán Mullaly as part of an on-going research project on Migrant Domestic Workers and EU Law, Workshop on Gender and Migration held at the EUI on June 19-21, 2012. Personal notes taken. See also UN OHCHR, Europe Regional Office, *Rights of Migrant Domestic Workers in Europe*, 2011, available at http://www.europe.ohchr.org/Documents/Publications/Study_Domestic_Migrant_webversion.pdf See also Triandafyllidou, Anna, “Irregular Migration and Domestic Work in Europe: Who Cares?”, in Triandafyllidou, Anna (editor), *Irregular migrant domestic workers in Europe: who cares?*, Burlington, Farnham, Research in Migration and Ethnic Relations Series, Ashgate, 2013, pp. 1-15.

the cause and consequence of their condition. Within the realm of migrants in general, though, the vulnerability constructed by the law is at the heart of *undocumented* migrant women's human insecurity.

Turning to the reaction by human rights bodies, recently, in its *General Comment No. 1 on Migrant Domestic Workers*, of 2011, the UN Committee on RMW noted that “migrant domestic workers are at *heightened risk* of certain forms of exploitation and abuse...These *risks and vulnerabilities* are further aggravated for migrant domestic workers who are *non-documented or in an irregular situation*, not least because they often risk deportation if they contact State authorities to seek protection from an abusive employer”.⁷³⁵ In this sense, undocumented migrants often face a *double victimization* given that on the one hand, their irregular status places them at higher risk of violations of their human rights, and on the other, their human right of *access to justice* is also affected because of their fear of deportation. The Committee also highlights a similar exposure and a correlated fear which aggravates such risk, when it analyses “women migrant domestic workers with irregular status, who are *especially vulnerable* during pregnancy, as they are often *afraid* to contact public health services out of *fear of deportation*”.⁷³⁶

Several civil society organizations have also documented the effects of this situation on undocumented women abused and living in EU countries.⁷³⁷ For example, a recent Human Rights Watch report tellingly titled ‘*The Law was Against Me*’: *Migrant Women's Access to Protection for Family Violence in Belgium*, found major protection gaps for migrant women who experience domestic violence in Belgium. Women who migrate to Belgium to join a husband or partner may face deportation if they report the violence during the period when their status is being confirmed, as do undocumented migrant women. And domestic violence victims, especially undocumented women, lack adequate access to shelters. These shelters often require women to contribute to the cost. Undocumented women who cannot do so are not eligible for financial support from local authorities available to other victims of domestic violence. Some women end up living on the streets after escaping very violent partners, who on occasions have threatened to kill them.⁷³⁸ This situation of extreme material deprivation that undocumented women may be forced into directly or indirectly due to an administrative procedure, seems to ring a bell with the case of *M.S.S. v. Belgium and Greece* referred to an asylum seeker –also a non-citizen in this case denied documented status as a refugee-, precisely against one of the countries viewed in the HRW report, in which the applicant suffered human rights violations partly due to his lack of papers as a non-citizen, as will be analysed below in the section of Illustrative legal cases.

Indeed, undocumented women are particularly vulnerable. Unauthorized stay in several EU countries is a criminal offense and police are required to report anyone who they suspect is in the country illegally to immigration authorities, such as in Belgium, for example. Women who do come forward have few avenues to obtaining legal status, especially if they do not have children. Other women endure years of abuse at the hands of their partner, coming forward only when they

⁷³⁵ UN Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, *General Comment No. 1 on Migrant Domestic Workers*, CRMW/C/GC/1, 23 February 2011, para. 7. Emphasis added.

⁷³⁶ *Ibid.*, para. 43.

⁷³⁷ See Human Rights Watch, “Belgium: Abused Migrant Women Fear Deportation. Legal Loopholes, Inadequate Shelter Access Send Women Back to Abusers”, 8 November 2012, available at <http://www.hrw.org/news/2012/11/08/belgium-abused-migrant-women-fear-deportation>

⁷³⁸ See HRW, ‘*The Law was Against Me*’: *Migrant Women's Access to Protection for Family Violence in Belgium*, November 2012. Belgium signed the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence on September 11, 2012, but has yet to ratify it.

obtain permanent residence through their children: only when they “have papers”.⁷³⁹ One of the civil society logos of “sans papiers, mais pas sans droits”⁷⁴⁰ seems to crudely come to mind.

Undocumented migrant women, including those who lost residency rights as a result of escaping violence, may risk deportation when they seek help from the police, and even if they are entitled to receive protection, many do not know this and continue to fear deportation. Indeed, “the real or perceived risk of deportation may create almost insurmountable barriers for undocumented victims of domestic violence to seek help and protection and can expose them to further abuse and exploitation. It also leads to impunity for perpetrators”.⁷⁴¹ In the case of the US, as was mentioned above, through the application of certain laws such as Arizona’s SB 1070, the fact that women immigrants are making enormous social and economic contributions in US communities is overlooked and such laws reflect ‘a broken system that leaves women in the shadows’.

One possible way to fully address the gaps for migrant women at the European level is to promote State ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the Istanbul Convention, described in Chapter III above, which requires countries to ensure protection irrespective of migrant status (article 4.3). It also singles out ‘migrant women’ as a group in a specific state of vulnerability, under the consideration that “migrant women, with or without documents, and women asylum-seekers are *particularly vulnerable* to gender-based violence. Although their reasons for leaving their country vary, as does their legal status, both groups are at *increased risk of violence* and face similar difficulties in overcoming it. It also requires that measures be taken to *prevent* such violence and *support victims* while taking into account the needs of vulnerable persons”.⁷⁴² As mentioned above, though, at the time of writing only one European country has ratified (Turkey) and ten ratifications are required for the Convention to enter into force. In the meanwhile, and as an on-going complementary position to strengthen legally binding provisions, I argue for a human security-based approach that can fill these gaps requiring for States to act under a *due diligence obligation* to prevent and take measures to address such violence against women, independently of the existence (or not) of a strict fully developed legal obligation to do so.

Addressing the conditions of undocumented migrants at the global level, in its account of State obligations towards undocumented migrant domestic workers, especially women and children, the UN Committee qualifies the vulnerabilities they face as “extreme” and based on article 69 of the CRMW calls for States to take appropriate measures to address such vulnerabilities and “consider policies, including regularization programmes, to avoid or resolve situations in which migrant domestic workers are undocumented or are at risk of falling into irregular status”.⁷⁴³

The intersectional discrimination⁷⁴⁴ suffered as an undocumented migrant worker and as a woman, had also been signalled by CEDAW in its General Recommendation No. 26 on *Women Migrant*

⁷³⁹ HRW, *The Law as against Me*, *op. cit.*, Executive Summary. See also the web-documentary by PICUM www.undocumentary.org for accounts on immigration legislation in several European countries.

⁷⁴⁰ See GISTI, Groupe d’ Information et de Soutien des Immigrés, “Les notes pratiques. Sans-papiers mais pas sans droits”, 5e édition, juin 2009, available at http://www.gisti.org/publication_pres.php?id_article=1615

⁷⁴¹ HRW, *The Law as Against Me*, *op. cit.*, p. 39.

⁷⁴² See http://www.coe.int/t/dghl/standardsetting/convention-violence/themes_migrant_women_en.asp

⁷⁴³ UN Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, *General Comment No. 1 on Migrant Domestic Workers*, *op. cit.*, para. 52.

⁷⁴⁴ On intersectional discrimination, see Crenshaw, Kimberley, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color”, *op. cit.* See also Lewis, Hope, “Between Iruea and ‘Female Genital

Workers, of 2008, as was mentioned above. In its General Recommendation, CEDAW highlighted the possibility of certain categories of women migrant workers being at risk of abuse, one of such categories being undocumented women migrant workers. The Recommendation aimed “to elaborate the circumstances that contribute to the specific vulnerability of many women migrant workers and their experiences of sex- and gender-based discrimination as a cause and consequence of the violations of their human rights”.⁷⁴⁵ CEDAW emphasized that

While States are entitled to control their borders and regulate migration, they must do so in full compliance with their obligations as parties to the human rights treaties they have ratified or acceded to. That includes the promotion of *safe migration procedures* and the obligation to respect, protect and fulfil the human rights of women throughout the migration cycle. Those obligations must be undertaken in recognition of the social and economic contributions of women migrant workers to their own countries and countries of destination, including through *caregiving and domestic work*.⁷⁴⁶

And in a clear echo of the *freedom from fear* and *freedom from want* aspiration of the human security idea, CEDAW underlined how

Undocumented women migrant workers are particularly vulnerable to exploitation and abuse because of their irregular immigration status, which exacerbates their exclusion and the *risk of exploitation*. They may be exploited as forced labour, and their access to minimum labour rights may be limited by *fear of denouncement*. They may also face harassment by the police. If they are apprehended, they are usually prosecuted for violations of immigration laws and placed in detention centres, where they are *vulnerable to sexual abuse*, and then deported.⁷⁴⁷

Similarly, the recent ILO Convention Concerning Decent Work for Domestic Workers refers in articles 8 and 15 to the State obligation to apply the provisions of the Convention also to domestic migrant workers and the duty to protect them from abusive practices, including those carried out by private employers.⁷⁴⁸

Not surprisingly, because of the pervasive risks detected in relation to the rights of undocumented migrants and the recognition that “migrant workers and members of their families in an irregular situation often *live in fear*”, the UN Committee on RMW will dedicate its General Comment No. 2 to the broad questions regarding precisely *The rights of migrant workers in an irregular situation and members of their families*, of which there is already a Draft version at the time of writing, open for submission of external stakeholders’ comments.⁷⁴⁹

Mutilation’: Feminist Human Rights Discourse and the Cultural Divide”, 8 *Harvard Human Rights Journal* 1, 1995; and Banks, Taunya Lovell, “Toward a Global Critical Feminist Vision: Domestic Work and The Nanny Tax Debate”, 3 *J. Gender Race & Justice* 1, 1999, pp. 1-44.

⁷⁴⁵ CEDAW, General Recommendation No. 26 on *Women Migrant Workers*, *op. cit.*, para. 2.

⁷⁴⁶ *Ibid.*, para. 3.

⁷⁴⁷ *Ibid.*, para. 22.

⁷⁴⁸ ILO Convention 189, Convention Concerning Decent Work For Domestic Workers, adopted by the General Conference of the International Labour Organization at its 100th session, 16 June 2011.

⁷⁴⁹ UN Committee on RMW, *Draft General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, December 2012, point 1.2, available at <http://www2.ohchr.org/english/bodies/CRMW/GC2.htm>

The cumulative and multiple forms of risk and discrimination identified by the UN Committee and to a certain extent by the ILO, are also confirmed by very recent cases in the US, reflected in the report by Human Rights Watch issued in May 2012, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*. The report reveals that hundreds of thousands of immigrant farmworker women and girls in the United States face a *high risk of sexual violence and sexual harassment* in their workplaces because, according to the report, US authorities and employers fail to protect them adequately. The report describes rape, stalking, unwanted touching, exhibitionism, or vulgar and obscene language by supervisors, employers, and others in positions of power. Most farmworkers interviewed said they had not reported these or other workplace abuses, due to *fear* of reprisals, loss of jobs or deportation. The report emphasizes the way in which immigrant farmworkers are subject to a dysfunctional immigration system and labour laws that exclude them from basic protections that many workers take for granted.⁷⁵⁰

As an illustration of the practical application of the gendered human security framework proposed in this thesis, one can find that the risk of human rights violations in these conditions in the United States had already been highlighted some months before by the UN Special Rapporteur on Violence Against Women. The Special Rapporteur, Rashida Manjoo, reported that her visit in 2011 to the US revealed the *particular vulnerability of undocumented immigrant women to violence, including sexual harassment and abuse, in the workplace*.⁷⁵¹

In the face of this “red alarm”, that is, *knowing* of the existence of actual abuses and *risks* of further violations, according to the criteria already analysed before in this text, the State’s obligations of protection had been triggered. The US or any State in the same situation, had an obligation to prevent and protect women farmworkers, especially immigrant women as particularly vulnerable, from the human rights violations they had already suffered or were likely to encounter. If a human security approach had been taken by US authorities in the light of the UN Special Rapporteur’s report, and the evidence documented thereby, probably some of these human rights violations would have been prevented. As it has been shown above in Chapter III, the use of non-governmental sources of information, like this NGO report, is one of the human security tools used recently in judicial analysis to shape the Court’s view on the level of State responsibility.

Although not explicitly referring to undocumented migrant women, General Comment No. 3 of the UN Committee Against Torture, of 2012, seems to perfectly fit the conditions faced by such women and the need for States to guarantee their human security in relation to their right of access to justice. The General Comment devotes significant attention to the duty for States to ensure that women and also victims of torture or inhuman or degrading treatment who are members of other marginalized or vulnerable groups (a category applicable to undocumented migrants, for example) are not denied access to justice or mechanisms for seeking and obtaining redress on a discriminatory basis, and also stresses that States must ensure that procedures to determine redress do not pose *obstacles* to members of vulnerable groups that could *prevent or discourage them from pursuing their claims*.⁷⁵²

⁷⁵⁰ Available at <http://www.hrw.org/node/107044>

⁷⁵¹ Report of the UN Special Rapporteur on Violence Against Women, UN General Assembly Resolution A/66/215, 2011, paras. 43-46.

⁷⁵² UN Committee Against Torture, General Comment No. 3, *Implementation of article 14 by States parties*, *op. cit.*, paras. 32-34.

The way legal irregularity interacts with the susceptibility of women migrant workers as exposed in the above-mentioned documents, allows for a deeper understanding of the “constructed vulnerability” of these women,⁷⁵³ as illustrated below in **Table 6** through considering certain human rights by way of example in their relation to the human right of access to justice:

⁷⁵³ On the role of the State in constructing vulnerability, see Anderson, Bridget, “Mobilizing migrants, making citizens: migrant domestic workers as political agents”, in *Ethnic and Racial Studies*, Vol. 33, No. 1, January 2010, p. 69. See also Scrinzi, Francesca, “The globalisation of domestic work: Women migrants and neodomesticity”, in Freedman, Jane (editor), *Gender and Insecurity: Migrant Women in Europe*, Aldershot, Ashgate, 2003, pp. 77–90.

Table 6

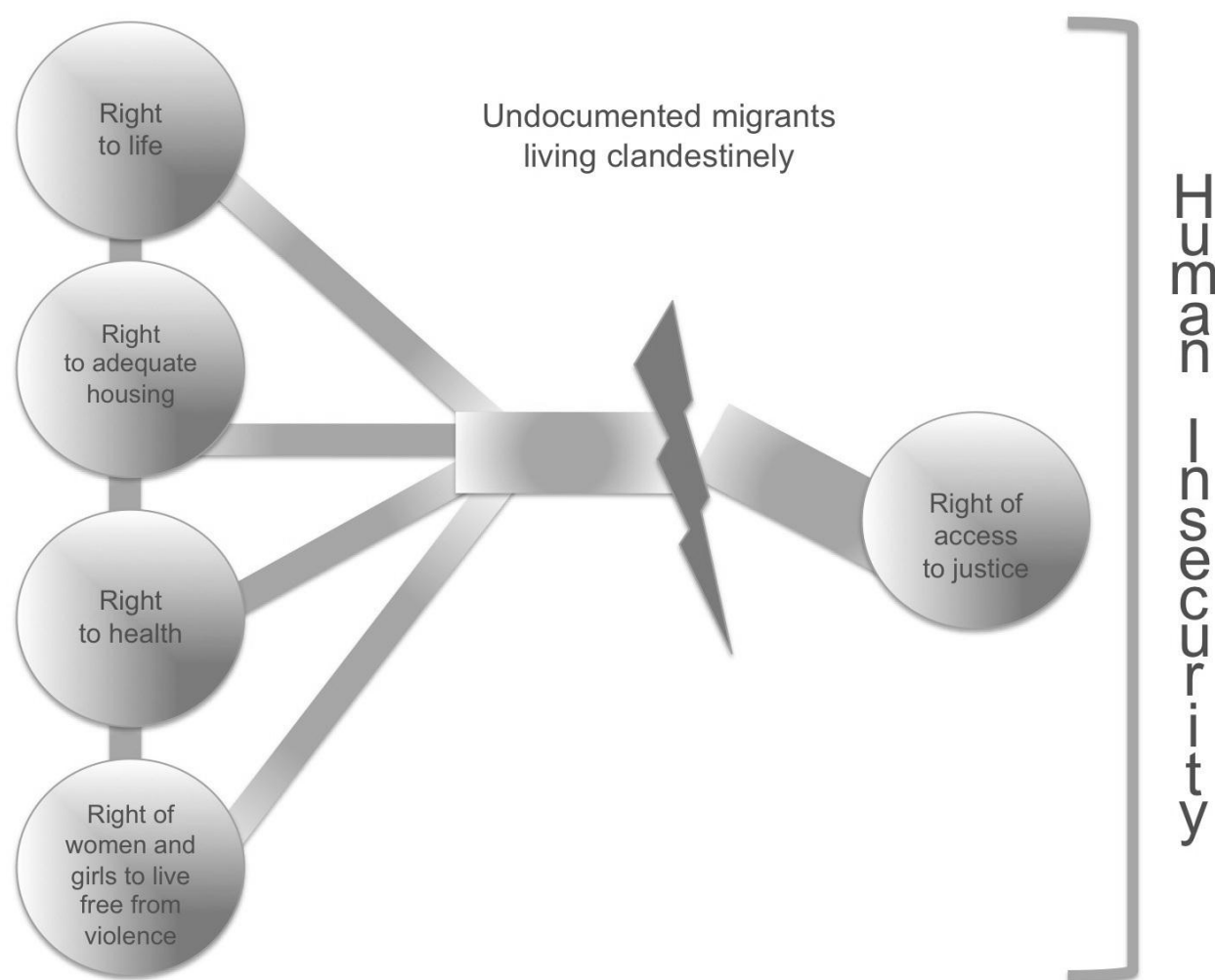


Table 6 illustrates how when confronted with the violation of a particular human right, undocumented migrants, and in a heightened manner, women and girls within this group, are unable or unwilling to turn to the institutional mechanisms in seek for redress for such violation. Due to the clandestinity derived from their irregular legal status, they fear denial of their rights or deportation if they dare come forward, or they often face serious substantive or procedural obstacles when they do. This violation both of a certain human right and to their right to access to justice, translates into a double victimization as explained above, and constitutes a grave source of human insecurity.

Indeed, access to justice is one of the most indicative rights of a generalized state of societal human security. As emphasized above, the inability to seek and obtain a remedy for breaches of domestic and international human rights law, exacerbates the *vulnerability, insecurity and isolation* of persons living in poverty and *perpetuates* their impoverishment.⁷⁵⁴ Certain groups

⁷⁵⁴ See *Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, op. cit.*, para. 67.

such as ethnic and racial minorities, contemporarily coupled together with migrants, have been recognized as suffering from *structural discrimination and exclusion*, *disproportionately represented among the poor*, and therefore encountering *additional barriers to access justice*.⁷⁵⁵ For some authors as Judge Cançado Trindade, the right of individuals to access the international system of justice has even reached the status of *ius cogens*.⁷⁵⁶

The debate on the status in International Law of the right of access to justice, or more specifically to international justice, as part of *ius cogens* exceeds the main focus of this thesis. The relevant fact for our purposes is to note that this debate reflects the high significance of this human right in International Law and that, in any case, the human right of access to justice is a ‘key’ right, which serves as guarantee of the general functioning of a legal system as a means not only for proper individual redress but also as an indicator of the social and political legitimacy of a legal system as a whole. An effective realisation of the right of access to justice at a generalized level, through the path of reparations, also gives way to the re-composing of the system where it has been unwilling or unable to duly prevent the violation or properly protect the person from certain risk factors. Contrarily, this Chapter’s examples of the systemic obstacles faced by undocumented migrant persons, particularly women and girls, for this right to be fulfilled, reveal serious protection gaps in the national and international legal framework and/or its implementation and such barriers place them in a situation of structural vulnerability.

IV.3.5 The particular case of asylum seekers

Special attention should be paid to asylum seekers for at least two reasons. One, the concept of a person or social group *at risk* is incorporated within the legal definition itself of ‘refugee’, as reviewed in section II.1.1 above, raising the flag for human security concerns. Secondly, asylum seekers, thus, potential refugees, have been especially affected by factual and legal uncertainty, partly due to cracks in the legal framework as applied at the regional or national level, and partly due to the current economic crisis which places strain on the implementation of the protective system as a whole and seems to work as an incentive or a valid justification for deepening such gaps.

Figures tell us that more than 42 million people are currently displaced by conflict or persecution. Of these, 15.2 million are refugees (residing outside their countries of origin) and 27.1 million people have been uprooted but remain within the borders of their own countries (internally displaced persons). Developing countries hosted four fifths of the global refugee population in 2009. They included 10.4 million people who fall under the aegis of the United Nations High Commissioner for Refugees (UNHCR) and 4.8 million Palestinian refugees, who are the

⁷⁵⁵ *Report by the UN Special Rapporteur on extreme poverty and human rights on the obstacles to access to justice for persons living in poverty*, UN General Assembly resolution A/67/278, 9 August 2012, para. 18.

⁷⁵⁶ See Cançado Trindade, Antônio Augusto, *The access of individuals to international justice*, Oxford University Press, Oxford, New York, 2011. Let us also recall in this instance the precedent set by the decisions of the ICJ in the *Avena Case* (Mexico v. United States, Judgment of 31 March 2004) and the *LaGrand Case* (Germany v. United States, Judgment of 27 June 2001). In these cases, the ICJ called for the United States to remedy, in its domestic law, a violation of a fundamental right of the individual, specifically Article 36 of the Vienna Convention on Consular Relations setting forth the right of foreigners arrested in one of the State Parties to be advised of their right to consular assistance, a right of which Mexican and German detainees, respectively, had not been informed of by US authorities.

responsibility of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).⁷⁵⁷

Indeed, in considering that approximately only one fifth of the global refugee population is distributed in receiving countries and regions of the Global North, one finds serious gaps of protection regarding asylum seekers and refugees, as will be evidenced below in the study of the *M.S.S. v. Belgium and Greece* and *I.H. v. France* cases. Let us take a look for example, at the legal system implemented by EU Law on refugee law, the ‘Dublin regime’ (formed by the Dublin Convention of 1990 and its successor the Dublin Regulation of 2003, this last one called Dublin II).⁷⁵⁸ Following Directives have tried to remedy the shortcomings of the Dublin system but have been faced with strong resistance by EU Member States.⁷⁵⁹ For Jim Hathaway, “the Dublin regime opts for efficiency within the European Union at the cost of *wilful blindness to international law*”.⁷⁶⁰ A recent attempt by the EU Council and the European Parliament to recast such “flawed system” in June 2012 has been considered “a missed opportunity”.⁷⁶¹ Thus, at least one finds a ‘mixed picture’ whereby on the one hand, EU Law has shown partial support of the existing understandings of international refugee law through judgements by the CJEU confirming such UN standards.⁷⁶² On the other, it has driven away from the standards and objectives of international refugee law. In Hathaway’s view, “despite the promise of accountability to international refugee law obligations suggested by the advent of binding directives and CJEU oversight, there are in fact major gaps between the European Union’s minimum standards and international law, with the result that a proposed destination country meeting just these standards is not in fact a place to which a refugee may lawfully be removed”.⁷⁶³

⁷⁵⁷ United Nations, *The Millennium Development Goals Report 2010*, p. 15, available at <http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%20r15%20-low%20res%2020100615%20-.pdf#page=22>

⁷⁵⁸ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities (Dublin Convention), June 15, 1990, 1997 O.J. (C 254) 1; and Council Regulation (EC) 343/2003 of 18 February 2003, 2003 O.J. (L 50) 1 (Dublin Regulation).

⁷⁵⁹ Council Directive 2004/83/EC of 29 April 2004, 2004 O.J. (L 304) 12 (Qualification Directive); See Hathaway, James C., “E.U. Accountability to International Law: the Case of Asylum”, in *Michigan Journal of International Law*, Vol. 33, No. 1, Fall 2011, pp. 3-5.

⁷⁶⁰ Hathaway, James C., *Ibid.*, p. 1. Emphasis added.

⁷⁶¹ Peers, Steve, “Revising the ‘Dublin’ rules on responsibility for asylum seekers: Further developments”, Professor of Law, Law School, University of Essex, in *Statewatch Analysis*, July 2012, p. 1, available at <http://www.statewatch.org/analyses/no-186-dublin.pdf>

⁷⁶² See for example the judgments by the CJEU in the cases of *NS and Others v SSHD* (Joined Cases of C-411/10 and C-493/10) analysed below in the section of Illustrative legal cases; and the recent cases C-179/11 *Cimade et GISTI* of 27 September 2012, in which the Court condemned the French practice of denying social assistance to the so-called “Dublinés”, asylum seekers awaiting transfer to another State to have their asylum application examined, and ruled that the Reception Conditions Directive must apply to all asylum seekers; Case C-245/11-K (Grand Chamber) of 6 November 2012, concluding on an automatic duty of any State (even when not obliged to *prima facie* according to Dublin) to take responsibility for asylum seekers when the humanitarian clause of family unity is involved, and adopting a broad interpretation of “family”; and C-277/11 of 22 November 2012, concluding that fundamental rights, specifically the right to be heard, must be respected where a State considers applications for subsidiary protection in a separate procedure from the refugee status determination. It is also possible to note with Steve Peers, though, that the Austrian officials concerned in Case C-245/11 K dealing with family reunification in a specially tragic case “should have seen the obvious human problems at stake...and applied the humanitarian clauses in the law as they were always intended to be used”, in Peers, Steve, *op. cit.*, p. 4.

⁷⁶³ Hathaway, James C., *op. cit.*, p. 4. See also Costello, Cathryn, “Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored”, in *Human Rights Law Review* 12 (2), 2012, pp. 287-339.

In this sense, the UNHCHR has emphasized that under the 1951 Refugee Convention, respect of ‘inter-State trust’ in EU Law cannot translate into Dublin II being applied in an unqualified automatic manner. Rather, “States have an autonomous responsibility under international law to uphold their international obligations, which would require them, in the Dublin II context, to consider whether or not the Member State in question is able effectively and practically to uphold the rights of the asylum-seeker under international law”.⁷⁶⁴

To provide another illustrative picture from a different geographical context, in the case of asylum seekers and actual refugees in Kenya, the insecurity and poor protection of the refugee camps causes many refugees who have the means, to leave the camps and proceed to urban centres of Kenya, in particular to Nairobi, the capital city of the country. Even in the case of refugee status having been granted, Somali people in Kenya, for example, are left “exposed on an ongoing basis to exploitation and insecurity, and unable to participate fully in society”. The security constraints have meant that there are huge delays in the resettlement submission, interview, and departure process. This further exposes vulnerable refugees to protracted periods of uncertainty, insecurity and sometimes violence.⁷⁶⁵ In an assessment of subjective human insecurities within refugee camps, violence against women was perceived to be in the top three threats, while women considered that police themselves were the third most frequent threat to security.⁷⁶⁶

Indeed, and to conclude this section by touching upon various of the intersecting issues analysed in this thesis, although the 1951 Refugee Convention does not refer to the need for particular protection in the face of gender-based violence, as was studied above, the 2003 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa does recognize the added vulnerability of women in situations of humanitarian crisis. As specified in Chapter III of this thesis, the protocol includes in its definition of VAW deprivations of fundamental freedoms during situations of armed conflict or of war (Article 1(j)), bringing within the Protocol women asylum-seekers and refugees as well as other categories of war-affected women.

Likewise, in the Inter-American context, the combined application of Articles 3 and 7 of the Convention Belém do Pará, reviewed above in Chapter III, allows for the protection of women and the possibility for the granting of refugee status in cases of risk of gender-based violence against them.

It has been submitted in Chapter II that human security may play an integrative role as an orienting concept in legal interpretation to fill these gaps and act as a *connecting bridge between the core content* of human rights. Because of the actual vulnerability faced by migrant persons in an irregular situation, and increasingly by migrant women and girls, human security becomes relevant

⁷⁶⁴ UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of M.S.S. v. Belgium and Greece*, June 2010, para. 4.3.9.

⁷⁶⁵ *Asylum Under Threat. Assessing the protection of Somali refugees in Dadaab refugee camps and along the migration corridor*, a publication of the Refugee Consortium of Kenya with the support of the Danish Refugee Council, Pann Printers Limited, Kenya, June 2012, pp. 80, 84, 88-89. See also UNHCR, Statement on the right to an effective remedy in relation to accelerated asylum procedures, 2010; UNHCR, “Thriving after a crisis: Security and empowerment in Dadaab”, 2012, retrieved from <http://www.unhcr.org/4f9947df6.html>, UNHCR. Protection: A Safety Net.

⁷⁶⁶ *Asylum Under Threat, Ibid.*, p. 46.

as a guiding notion to give *due visibility to these threats* that affect their human rights and for such risk factors to be taken into account in the analysis of human rights obligations.⁷⁶⁷

If a human security framework were to be applied to the analysis of the threats to the human rights of migrant persons, as well as to the actual violations themselves, possibly another story could be told in relation to the outcome. To test the feasibility and the added value of human security sensitive analysis, one would have to try to draw the way such a picture would look and the differential consequences of applying such an analysis instead of another, as is carried out in the following section.

IV.4 Illustrative legal cases of a human security-based approach to migrants' human rights

This section intends to exemplify how a human security-sensitive perspective may orient human rights' interpretation when put to work in practice, as well as the consequences that may unfold when it is overlooked. It will draw the picture of how some of the identified normative tools may be utilized to enhance human rights protection when applied through a human security-based approach or reduce such protection when disregarded.

1. Human security-sensitive cases

With its call to view widespread and systematic threats that are often overlooked in traditional individualistic human rights analysis, the idea of a human security-sensitive outlook seems to have found its way as a useful tool into judicial interpretations, of which those with a more direct bearing on the identification of structural vulnerabilities under the human security-human rights synergy will be spelled out in further detail:

- A. The ECHR in the recent case of *M.S.S. v Belgium and Greece*, precisely in the realm of non-citizens, considered the transfer of an Afghan asylum seeker from Belgium to Greece –where he had been living in the streets with no access to minimum means of subsistence– to be a violation by Belgium of article 3 (on obligation of *non refoulment*) and of such article in conjunction with article 13 (right to an effective remedy) of the ECoHR. It also concluded that Greece violated article 3 because the living conditions experienced by the applicant as part of the group of asylum seekers more generally, amounted to a violation of the right to be free from torture and inhuman or degrading treatment. Notably, it did so arguing that M.S.S. was in a vulnerable situation by taking into account his individual distress but against the background of *systemic conditions of material deprivation* faced in Greece by asylum seekers as a “vulnerable population group in need of special protection”.⁷⁶⁸ To this respect, one may recall that the analysis of systemic risk situations is considered as a general stand in the 1984 Cartagena Declaration on Refugees, explained in section II.1.1 above.

⁷⁶⁷ Actually, the idea of collective vulnerability due to structural discrimination that places certain groups and their members at risk has already been used in cases of violence against women by human rights judicial bodies as Chapter III of this thesis illustrates; see the cases of *Opuz v. Turkey*, ECHR, 2009, and *Cotton Field v. Mexico*, IACHR, 2009.

⁷⁶⁸ ECHR, *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 21 January 2011, para. 251; see also paras. 232 and 233.

Based on considerations of existing systemic risks for asylum seekers in Greece, the ECHR found that the decision by Belgium to return the applicant to Greece, (the country where he had first entered the EU), violated article 3 because it exposed him to treatment prohibited in such article, such prohibition being of an absolute nature and regarded by international case law and legal analysis to constitute *ius cogens*.⁷⁶⁹

It is true that the ECHR had for many years sustained that an expulsion or deportation of an individual to a country where she or he may be subjected to treatment in violation of Article 3 incurs the responsibility of the deporting State under the Convention.⁷⁷⁰ It had also constrained asylum seeker and refugee removals by reliance on the prohibition of exposure to torture or to inhuman or degrading treatment or punishment, requiring a verification by the State of a real risk under Article 3 through an examination of the foreseeable consequences of the expulsion that took into account (1) the general situation in the country of destination and (2) the personal circumstances of the asylum-seeker.⁷⁷¹ But the decision in *M.S.S.* is original in the sense of insisting that *subjection to severe precarious economic conditions abroad* may meet that test.⁷⁷² Emphasizing objective as well as subjective elements of human insecurity, the Court noted *M.S.S.*'s indigence in Greece due to official inaction, the "prolonged uncertainty" of his situation, and the "total lack of any prospects of his situation improving", and considered such conditions to give rise to a violation also by Greece of the absolute prohibition of torture and inhuman treatment contained in article 3.⁷⁷³

In what would seem to be a connection between policy considerations and judicial adjudication, the United Nations Millennium Development Goals Report 2010 (MDG) had

⁷⁶⁹ See the cases by the International Criminal Tribunal of Ex-Yugoslavia (ICTY), Trial Chamber II, *Prosecutor v. Furundzija*, 10 December 1998, case no. IT-95-17/I-T, paras. 137-146 153-157; *Prosecutor v. Delacic and Others*, 16 November 1998, case no. IT-96-21-T, para. 454; and *Prosecutor v. Kunarac*, 22 February 2001, case no. IT 96-23-T and IT-96-23/1, para.466. On *ius cogens* more generally see International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, Judgment, I.C.J. Reports 1996, p. 595; and *Reservations to the Convention on Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 15. In the *Case Concerning The Barcelona Traction, Light and Power Company, Limited, Belgium v. Spain*, Judgment 5 February 1970, the ICJ also distinguishes "between the obligations of a State towards the *international community as a whole*, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the *importance of the rights* involved, *all States* can be held to have a *legal interest* in their protection; they are obligations *erga omnes*", para. 33. Emphasis added (except in last phrase).

⁷⁷⁰ As the first in a line of cases in this sense, see *Soering v. United Kingdom*, 7 July 1989, Series A no. 161, paras. 90-91, where the United States sought the extradition from the United Kingdom of a fugitive who faced murder charges in the state of Virginia. The applicant sought to have the extradition halted on the grounds that should he be convicted of murder in the United States, he would face the death penalty. See also *Chahal v. the United Kingdom*, 15 November 1996, para. 96.

⁷⁷¹ See the cases of ECHR, *Y. v. Russia*, Appl. No. 20113/07, 4 December 2008, see note 88, para. 78; *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008, paras. 128-129; *N. v. Finland*, 38885/02, Appl. No. 38885/02, 26 July 2005, see note 87, para. 167; *Vilvarajah and Others v. The United Kingdom*, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991, para. 108.

⁷⁷² See the analysis in this respect in Hesselman, Marlies, "Sharing International Responsibility for the Protection of Poor Migrants? An analysis of Extra-Territorial Socio-Economic Human Rights Law", University of Groningen - Faculty of Law, February 16, 2012, available at SSRN, from 'Access Denied' Conference in Amsterdam on 13-14 March 2012, International Conference on Social Protection and Migration. Publication in *European Journal of Social Security* (2013, Forthcoming).

⁷⁷³ ECHR, *M.S.S. v. Belgium and Greece*, *op. cit.*, paras. 260-263. See also paras. 238 and 239, and concluding paras. 5, 10 and 13. In this sense, see also UNHCR, "Submission by the Office of the United Nations High Commissioner for Refugees in the case of *M.S.S. v. Belgium and Greece*", June 2010, available at <http://www.unhcr.org/4d4bfebe9.pdf>

warned that “Conflicts are a major threat to *human security* and to hard-won MDG gains. Years after a conflict has ended, large populations of refugees remain in camps with limited employment and education opportunities and inadequate health services. Not surprisingly, refugees often become dependent on subsistence-level assistance and *lead lives of poverty and unrealized potential*”.⁷⁷⁴

In recognizing material deprivation as amounting to inhuman treatment and, in consequence, to a possible basis for violation of the *non-refoulment* principle, the ECHR upheld the right of M.S.S. -an Afghan national-, under Article 3 of the European Convention, not to be expelled by Belgium under the risk of suffering torture or inhuman or degrading treatment because of the systemic precarious socio-economic conditions of asylum seekers in the country of return, and the risk of not being able to access an adequate remedy in case of violations given the particularly appalling living conditions of asylum seekers in Greece.⁷⁷⁵ Thus, the Court concluded, among other violations, that Belgium had violated the principle of *non refoulment*, and that Greece had also violated article 3 on the account of the living conditions of M.S.S. which amounted to inhuman or degrading treatment.

Through the decision, the Court also endorsed M.S.S.’s entitlement to exist within a context of social conditions that allowed him to enjoy the broader freedom to live in dignity, in line with the idea of human security *as an enabling environment for human rights*, as argued in section II.2.2 of this thesis. In turn, this individual decision seems to find a shared link with the prevalent more generalized concern at the global level expressed in the MDG report regarding the hardship confronted by refugees and asylum seekers as a collectivity.

To put this case in its proper context, as the human security emphasis pushes us to do, one must consider also that Afghans and Iraqis continue to be the largest refugee populations under the UNHCR mandate, totalling 2.9 million and 1.8 million people, respectively, according to data from the end of 2009. Together they account for nearly half of all refugees under UNHCR care.⁷⁷⁶ Under this light, the case of *M.S.S. v Belgium and Greece* acquires special relevance and raises acute questions as to the role of developed countries in the global refugee system and, more importantly, in upholding the humanitarian principles that gave way to its creation.

Other concerns covering undocumented migrants in general arise too when viewing the situation of a sector of migrants placed in a particularly vulnerable condition in their transit

⁷⁷⁴ United Nations, *The Millennium Development Goals Report 2010*, p. 15, available at <http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%20r15%20-low%20res%2020100615%20-.pdf#page=22>

⁷⁷⁵ *M.S.S. v. Belgium and Greece*, *op. cit.* paras. 357-359. For other ECHR cases involving non-nationals, see *Gaygusuz v. Austria*, Judgment of 16 September 1996, para. 42; *Koua Poirrez v. France*, Judgment of 30 September 2003, para. 46. In both of these judgments, Article 1 of the First Protocol to the ECHR, 1952, concerned with the protection of property, was interpreted as encompassing access to social security benefits for the non-nationals concerned. See also UN Human Rights Committee, Communication No. 965/2000 concerning the case *Karakurt v. Austria*, 4 Apr. 2002, UN Doc. CCPR/C/74/D/965/2000, para. 8.4, relating to a regularly working Turkish citizen in Austria and the limitation to his right to stand for election to the relevant work-council, on the basis of his citizenship. The UN HCRC decided there had actually been a violation of Art. 26 of the ICCPR on non-discrimination.

⁷⁷⁶ United Nations, *The Millennium Development Goals Report 2010*, *op. cit.*, p. 15.

across national borders, namely undocumented migrant children. The most recent account of the UN Committee on the Rights of the Child addresses the situation of children in immigration detention and exemplifies their heightened risk to human rights violations precisely through the circumstances faced by undocumented Afghan children in Greece.⁷⁷⁷ In this respect, looking at recent developments, possibly other cases involving detention conditions of undocumented migrants in general, and not only asylum seekers, may represent promise for furthering a human security-sensitive approach.⁷⁷⁸

- B.** The possible influence of human security ideas at the European level may be adventured even further in looking at the more reduced geographic area of competence of the EU, through a recent case by the Court of Justice of the European Union (CJEU), *NS and Others v. SSHD*, of 2011, which echoed the ECHR case of *M.S.S. v Belgium and Greece*. The case concerned an Afghan asylum seeker in the United Kingdom who first entered the EU through Greece. Ordinarily the applicant would have been sent to Greece to have his asylum claim considered there. However, he challenged his transfer to Greece, claiming that his human rights would be infringed by such a transfer as Greece would be unable to process his application. There also seems to be a human security perspective at work in the interpretation of EU Law in this case in the way the Court considered collective conditions and systemic obstacles for the enjoyment of human rights, when it declared that “Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’...where they cannot be unaware that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a *real risk* of being subjected to inhuman or degrading treatment”.⁷⁷⁹

⁷⁷⁷ See OHCHR, “Hear Our Voices - Children in Immigration Detention”, 13 November 2012, available at <http://www.ohchr.org/EN/NewsEvents/Pages/MigrantChildrenDetention.aspx> (emphasis added).

⁷⁷⁸ Detention conditions in Greece were also considered in another recent ECHR case: see *Bygylashvili v. Greece*, Application no. 58164/10, 25 September 2012. The applicant, Gannet Bygylashvili, a Georgian national, took a case against Greece claiming a violation of Article 3 regarding prohibition of inhuman and degrading treatment. The Court decided that the detention conditions, after her arrest for irregular entry into the country, in the premises of the Attica sub-directorate with responsibility for foreigners, were inhumane due to the fact of over-crowding, lice infestation and poor quality drinking water. Note also that regarding this subject in another regional setting, the IACoHR presented to the Inter-American Court on 21 February 2012, the case of *Pacheco Tineo Family v. Bolivia* (Case No. 12.474), referred to the return of the Pacheco Tineo family to Peru on February 24, 2001, as a consequence of the rejection of the request for recognition of refugee status in Bolivia. The Pacheco Tineo family, formed by a couple of man and woman and their three children, entered Bolivia on February 19, 2001. The migration authorities took note of their irregular situation and initiated actions directed toward their expulsion to their country of their nationality, Peru. Later, the man, Rumaldo Juan Pacheco, requested that the State of Bolivia recognize the status of refugees for all members of his family because they would be at risk in Peru. This request was rejected in a matter of hours, summarily and in violation of the guarantees of due process. The case was qualified by the IA Commission as involving issues of “Inter-American public order”, given that it is the first case submitted to the IA Court about violations that occurred in the context of proceedings on a request for recognition of refugee status. In addition, given that the family was returned without a serious determination of the risk situation in their country of origin, the case will allow the IA Court to rule *for the first time on the non refoulment principle in a contentious case*. Also, these aspects will be analysed in the light of the special obligations of protection and the best interest of the child; see http://www.oas.org/en/iachr/media_center/PReleases/2012/022.asp

⁷⁷⁹ Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 21 December 2011 (references for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) and from the High Court of Ireland - United Kingdom, Ireland) - N.S. (C-411/10) v Secretary of State for the Home Department and M.E. (C-493/10), A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform: *NS and Others v. SSHD*, Judgment of the Court (Grand Chamber), 21 December 2011 in Joined Cases C-411/10 and C-493/10, paras. 94 and 106; para. 2 of the Operative Part of the Judgment. Emphasis added.

The CJEU in studying the applicable EU Dublin regulation on asylum seekers and refugees against ‘fundamental rights’ concluded that “the presumption underlying the relevant [Dublin] legislation,...that asylum seekers [in another EU Member State] will be treated in a way which complies with fundamental rights, must be regarded as rebuttable”. Therefore, “European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union”.⁷⁸⁰

- C. Similarly, the case of *I.M. v. France*, decided by the ECHR in February 2012,⁷⁸¹ involved a Sudanese man from Darfur who was arrested upon arrival in France and sentenced to one month in prison for an immigration infraction. At the end of his sentence, I.M. was placed in immigration detention pending deportation to Sudan. His application for asylum, submitted while in detention and processed under the accelerated procedure, was rejected. Because his appeal to the National Court of Asylum did not have suspensive effect, he risked being returned to Sudan before the Court had examined his appeal.

In its ruling in the case of *I.M. v. France*, the Court underlined that the effectiveness of an appeal depends on the requirements of quality, speed and its suspensive effect, considering in particular the importance the Court attaches to article 3 and the irreversible nature of the harm likely to be caused if the risk of torture or ill-treatment should be realized. In finding fault with the “fast track” procedure, the Court emphasized that the individual did not in practice have the means to appeal, and concluded there had been a violation of the right to an effective remedy. For at least five years, ACAT France, Amnesty International France and Human Rights Watch had advocated to French authorities the need to bring France’s asylum procedure in line with international human rights law. In this sense, the State *knew or ought to have known* of the risk this type of procedure posed for asylum seekers’ rights, and thus had room to apply the due diligence duty and protecting I.M.’s human rights and security.

- D. In another recent illustrative case, *Kuric and Others v. Slovenia* -this one involving statelessness-, the ECHR analysed the situation of people who had been left without a nationality for years due to a lack of fulfilment of an administrative procedure after the partition of former Yugoslavia. Thus, the applicants in this case were left stateless after the dissolution of Yugoslavia and later had their records removed from the civil registry, losing their right to residence. The Grand Chamber of the Court ruled in 2012 that the Slovenian authorities treatment of the so-called “erased” is in violation of Article 8 (right to private and family life) of the European Convention, as well Article 14 (prohibition of discrimination) in relation to Article 13 (right to an effective remedy). The Court found that the prolonged refusal to resolve the applicants’ residence status constituted an interference with their right to private and/or family life, and that they had been discriminated against because they were in disadvantaged situation compared to other foreigners in Slovenia.⁷⁸² Under a human security lens, the sentence also enhances the

⁷⁸⁰ CJEU, *NS and Others v. SSHD, Ibid.*, paras. 104 and 105. See also the review presented in Buckley, Joanna, “NS v Secretary of State for the Home Department (C-411/10)”, *European Human Rights Law Review*, 2012, pp. 208-210.

⁷⁸¹ ECHR, *I.M. v. France*, Appl. No. 9152/09, 2 February 2012, see paras. 145 and 155.

⁷⁸² See ECHR, *Kuric and Others v. Slovenia* (GC), Application no. 26828/06, 26 June 2012.

victims' freedom from fear of deportability and their *de facto* situation of lack of access to rights due to their condition of statelessness.

- E. The recent case of *Kiyutin v. Russia*, despite its similarities with the case of *N. v. UK* which will be reviewed below as a non-human security sensitive case, may offer reasons for hope as an open door for future more protective interpretations that could also incorporate a much needed gendered perspective. In *Kiyutin v. Russia*, mentioned above, the case involved an Uzbekistan national married to a Russian woman with whom he had a daughter and who resided in Russia since 2003. He was denied a residence permit by Russia and subsequently received an expulsion order from such country on the basis that he was HIV-positive. The Court specifically recognized that “Admittedly, not all settled migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy “family life” there within the meaning of Article 8... However, the concept of “family life” must at any rate include the relationships that arise from a lawful and genuine marriage..., such as that contracted by the applicant with his Russian spouse and in which their child was born” and concluded that Russia had actually violated Art. 8 in conjunction with Art. 14 (non-discrimination) by denying the residence permit to the applicant and ordering his expulsion in a discriminatory manner on account of his health status, given people with HIV status are considered “a vulnerable group”. Interestingly, the Court used General Comment No. 20 of the UN Committee on ESCR, *The Right to Non-Discrimination*, in its interpretation of the scope and content of discrimination.⁷⁸³
- F. Within the jurisprudence of the Inter-American Court of Human Rights, there is a significant case that considers the dimensions of gender and children's rights in the context of undocumented migration, in which the Court revisited the same line adopted in its AO 18/03, *Juridical Condition of Undocumented Migrants*, already examined. In the *Case of the Yean and Bosico Children v. Dominican Republic*, of 2005, the Court concluded that the Dominican Republic violated the right to nationality of two girls of Haitian origin, Dilcia Yean and Violeta Bosico, daughters of undocumented migrants, since the Civil Registration Office refused to issue their birth certificates, even when they enjoyed this right according to Dominican legislation itself.⁷⁸⁴

Drawing the implicit links between the human security approach and the enjoyment of human rights by persons in vulnerable conditions, the Court analysed this case considering the whole social setting in which the girls were placed and underlined that “the discriminatory treatment imposed by the State on the Yean and Bosico children is situated *within the context of the vulnerable situation* of the Haitian population and Dominicans of Haitian origin in the Dominican Republic, to which the alleged victims belong”. Looking at the widespread character of these threats through the study of the individual experience of the girls, the Court emphasized the double situation of vulnerability of the victims, because of lack of nationality and because of being child girls. The Court held that racial discrimination in access to nationality breaches the American Convention of Human Rights and concluded that the discriminatory application of nationality and birth registration laws rendered children of Haitian-descent stateless. This violated the recognition of their

⁷⁸³ ECHR, *Kiyutin v. Russia*, Application no. 2700/10, 10 March 2011, paras. 55, 74, 64 and 30.

⁷⁸⁴ Inter-American Court of Human Rights, *Case of The Yean and Bosico Children v. Dominican Republic*, Judgment of September 8, 2005.

juridical personality, and was an affront to their dignity. They were unable to access other critical rights to education, to a lawfully registered name, and to equal protection before the law. The expulsion of Violeta Bosico from school violated her right to special protection as a child.⁷⁸⁵

As part of the subsequent impact of this case, it should be noted that in response to the Court's decision to stop discrimination against Dominicans of Haitian descent, the government began its "retroactive policy" of withdrawing citizenship from people who were once recognised as citizens of the Dominican Republic. As a result, in June 2010 a petition was filed before the IACoHR in the case of *Emildo Bueno v. Dominican Republic*, concerning the case of a man who used to hold Dominican citizenship and was deprived of it. Despite the fact that he was born, raised and had previously held identification documents in the Dominican Republic, he was later denied an identity document on the basis of his Haitian descent. This retroactive application of the law and the revocation of nationality in the Dominican Republic left Emildo Bueno stateless and it is contended that it violates his rights of family life. Currently, the case is under consideration within the Inter-American human rights system.⁷⁸⁶

The systemic character of these risks was taken up some years later by the UN Committee on Economic, Social and Cultural Rights when it regretted that regardless of the *Yean and Bosico* judgment, discrimination against Haitian children persisted in Dominican Republic. It voiced its alarm that such discrimination had even transcended the realm of practice and had been incorporated not only into migration laws but also into the 2010 Dominican Constitution, illustrating the circular relationship between discriminatory laws and the reinforcement of harmful practices. Adopting the language of human security concerns, the Committee noted that the generalized situation of revocation of identity documents or non-renewal of residency documents based on such legal provisions had "*increased the exposure of Haitian children and Dominican children of Haitian descent, especially, to discriminatory practices*".⁷⁸⁷ Actually, this position is coherent with article 29 of the CRMW which specifically sets forth the right of a child of a migrant worker (documented or not) to a name, registration of birth and nationality.

Actually, this environment of structural discrimination and its practical consequences have been recently revisited within the Inter-American system. The Inter-American Commission filed on 11 February 2011 an application with the Inter-American Court in the case of *Nadege Dorzema et al. ("Guayubín Massacre")*, with respect to the Dominican Republic.

The case involves events that took place along the Dominican Republic's border with Haiti on 18 June 2000, when members of the Dominican army opened fire on a vehicle that was transporting a group of Haitians. Seven individuals lost their lives, and several others were wounded. The acts were prosecuted in military courts, even though family members of those executed had requested that the case be subject to the jurisdiction of the regular

⁷⁸⁵ *Ibid.*, paras. 168, 142 and 134. Emphasis added.

⁷⁸⁶ See Summary of the Initial Petition in the case of *Emildo Bueno Oguis v. Dominican Republic*, presented to the Inter-American Commission on Human Rights, June 1, 2010; Open Society Justice Initiative and CEJIL, available at <http://www.soros.org/sites/default/files/Petition%20Summary-20100601.pdf>

⁷⁸⁷ UN Committee on Economic, Social and Cultural Rights, Concluding Observations of the report submitted by the Dominican Republic, E/C.12/DOM/CO/3, 19 November 2010, para. 11. Emphasis added.

courts. After several years of proceedings, the military courts acquitted the soldiers involved. The case also involves the fact that some of the victims who survived suffered a violation to their personal liberty and violations to their right to a fair trial and their right to judicial protection, given that they were expelled from the Dominican Republic without having received due guarantees based on their status as migrants. Finally, the case falls within a *context of structural discrimination* against Haitians or persons of Haitian origin at the hands of Dominican agents.⁷⁸⁸ In October 2012, the Court ruled against the Dominican Republic for its responsibility in the existing general pattern of discrimination against migrants. The Court concluded there was a violation of the right to equality and non-discrimination and, for the first time in its jurisprudence, of the prohibition of collective expulsions of foreigners contained in article 22 of the American Convention.

Also, the IACoHR filed in July 2012 an application with the Inter-American Court in the case of *Benito Tide Méndez et al., Dominican Republic*. The facts of this case refer to the arbitrary detention and summary expulsion from the territory of Dominican Republic into Haiti of Benito Tide Méndez and another nine adults and 17 children.

The summary expulsions occurred in a context of *collective* and mass expulsions of individuals, affecting both Dominicans and foreigners and *both documented and undocumented persons* who had their permanent residence in the country and strong employment and familial ties with the Dominican Republic. Claims have been made that phenotypical characteristics and a darker skin colour were decisive factors when individuals were selected for detention and subsequent expulsion, indicating a *pattern* of discrimination. All the victims of the case were expelled to Haiti.⁷⁸⁹

Some of these questions on the structural vulnerability amounting to a state of generalized human insecurity for Haitians and Dominicans of Haitian descent are open before the Court, and the response is yet to be seen.

- G. Another interesting case also dealing with the intersecting points of discrimination against women and migration, as approached in this thesis, is that of *B.S. v. Spain*, resolved in July 2012.⁷⁹⁰ The case concerned a woman of Nigerian origin, legally residing in Spain, who was stopped by the police while working as a prostitute on the outskirts of Palma de Mallorca. The Court found that the State had not conducted an adequate and effective investigation into her allegations of ill-treatment on two occasions when she was stopped and questioned in the street. Using the human security language, the Court considered that the domestic courts had not taken into account B.S.'s *special vulnerability* to discriminatory attacks inherent in her situation as an *African woman working as a prostitute*.⁷⁹¹ The Court concluded there had been a violation of article 3 (prohibition of inhuman and degrading treatment, in its procedural arm relating to the lack of an effective investigation), as well as of article 14 (prohibition of discrimination) in conjunction with article 3.

⁷⁸⁸ See IACHR Press Release (Case 12.688), available at http://www.oas.org/en/iachr/media_center/PReleases/2011/012.asp

⁷⁸⁹ See IACHR Press Release, "IACHR Takes Case Involving Dominican Republic to the IA Court HR", July 18, 2012 (Case No. 12.271), available at http://www.oas.org/en/iachr/media_center/PReleases/2012/091.asp

⁷⁹⁰ ECHR, *B.S. v. Spain*, Appl. No. 47159/08, 24 July 2012.

⁷⁹¹ *Ibid.*, para. 71. Emphasis added.

However, in looking at further human security dimensions of this case, it is interesting to note that the applicant had sought for *structural problems of discrimination* against prostitutes of African origin to be addressed by the Court, transcending her own individual situation. Such structural discrimination, also of an intersectional character -on the basis of race and gender- was reflected both in the fact that prostitutes of a “European phenotype” were not routinely stopped by police forces, as well as in the prejudiced approach displayed by the Spanish judiciary system in this type of cases affecting black women. In fact, in her request for reparations, apart from her individual petition of monetary compensation, the applicant asked for the procedure regarding the investigation of ill-treatment to be reopened as a measure of *restitutio in integrum*, and for the broader measure of a protocol to be adopted by Spanish authorities to set adequate standards for official responses to discrimination cases of the kind.⁷⁹² The Court rejected these structural measures of reparation based on the argument of the State’s discretion in the measures of executing the judgment and implementing reparations (under jurisprudential interpretation of article 46 of the ECoHR) and settled with the traditional individual monetary redress –in this case 30,000 euros for moral damage-, thus missing out on exploring the deeper and more far-reaching human security implications of the case.

- H. In the case *K.A.B. v. Spain*, also of 2012,⁷⁹³ the European Court of Human Rights held, by a majority of six to one, that there had been a violation of Article 8 (right for respect to private and family life) of the European Convention on Human Rights. The case concerned the adoption – despite the father’s opposition – of a child who was declared abandoned after his mother’s deportation. The applicant, K.A.B., was a Nigerian national who was born in 1976 and lives in Barcelona. In 2001 he entered Spain irregularly with his partner, C., a Nigerian national, and their son O., who had been born in 2000, and settled in Murcia. He regularised his residence and work authorizations between May and September 2001. On 17 October 2001 C. was deported from Spain without being allowed to return for 10 years. Her lawyer had pleaded that she was the mother of a one-year-old baby but the order was nevertheless enforced. O. was taken in by friends of the couple, as the applicant (the father) was in Barcelona for work-related reasons. On 1 November 2001 an investigation was opened by the prosecutor responsible for minors. As the Child Protection Department had not succeeded in reuniting the child with its mother, O. was declared abandoned on 16 November 2001 and placed in a children’s home. On 30 November 2001 the applicant went to the Child Protection Department and, claiming to be the child’s biological father, said that he disagreed with the placement. He expressed his intention to undergo a paternity test. In January 2002 the director of the children’s home took O. for the test but it did not take place as the applicant *had not payed for it*. In the absence of further news of K.A.B. the child was placed in a foster family. The family initiated an adoption procedure in respect of O., but it was suspended when K.A.B. brought an action to establish paternity on 20 November 2004. After obtaining recognition of his paternity in November 2005, he started proceedings to challenge the adoption but was unsuccessful.

The Family Court took the view that K.A.B.’s agreement to the adoption was not required because, as the applicant had not discharged the duties inherent in parental authority, a hearing was sufficient. That decision was upheld by the *Audiencia Provincial*, which

⁷⁹² *Ibid.*, paras. 61-64; 70 and 78-81. Emphasis added.

⁷⁹³ ECHR, *K.A.B. v. Spain*, Appl. No. 59819/08, 10 April 2012 (final 10 July 2012).

pointed to the applicant's lack of interest and found in particular that he had confined himself to seeking the paternity test, "without conviction", before giving up on encountering the first difficulty and remaining passive for two years. The applicant's *amparo* appeal was declared inadmissible as being devoid of constitutional content. On 25 April 2007 O.'s adoption by his foster family was authorised by the Family Court. On an appeal by K.A.B. that decision was upheld by the Supreme Court. Relying on Articles 6 (right to a fair hearing) and 8 (right to respect for private and family life), the applicant complained that he had been deprived of all contact with his son and that neither he nor the child's mother had been informed of the proposal to adopt the child. He also complained that the authorities had remained inactive regarding C.'s deportation and his attempts to prove his paternity.

The Court found, in particular, that the *authorities' inaction*, the deportation of the mother without prior verification, the failure to assist the applicant with his formalities, in spite of his *vulnerability and precarious social and economic situation*,⁷⁹⁴ and the exclusive attribution of responsibility to the applicant for the child's abandonment, had decisively contributed to preventing any possibility of reunion between father and son, in breach of the applicant's right to respect for his private life. The Court also noted the State's obligation to duly take into account *in a realist manner*, not only the procedural routes available *in theory* in a given legal system, but also the *political and legal context* in which they develop, as well as the *personal circumstances of the applicants*.⁷⁹⁵ These considerations seem to reflect two main human security components. First, the need for State bodies to assess the structural context underlying the formality of the law and its practical implementation, when ruling on or adjudicating a case. Secondly, the judgment emphasizes the State's duty to consider conditions of vulnerability and precariousness of a person, and his or her relationship to a broader disadvantaged group (in this case undocumented migrants), as a part of its human rights' obligation to prevent further violations and reinforce protection towards such persons.

On the other hand, under a human security light, and especially comparing this judgment with the previous one of *B.S. v. Spain* issued in the same year, the reparations granted by the Court in *K.A.B.* seem grossly inadequate considering the gravity of this case: only 8000 euros of monetary compensation for moral damage (compared against 30,000 euros in the previous case), and nothing to improve generalised adoption procedures in Spain, especially those regarding non-national children and/or parents, to provide them with safeguards for human rights protection. Given that the sentence sees the light 11 years after the facts (and three after its first knowledge by the ECHR), when the child has already been living for several years with a foster family, it can be clearly concluded that the main aspects of this situation will not change and have irreparably affected the applicant and child's (as well as the mother's) lives.

- I. In a recent case resolved by the UN Committee Against Torture (CAT), on January 27, 2012, the Committee looked at the conditions faced by undocumented migrants from Senegal trying to arrive by boat to the autonomous Spanish city of Ceuta in September of 2007, and intercepted by the Civil Guard at sea and left near the coast of Morocco. Due to police negligence in not leaving them close enough to the coast (and presumably

⁷⁹⁴ *Ibid.*, paras. 113 and 114; see also paras. 93 and 110-111.

⁷⁹⁵ *Ibid.*, para. 74.

perforating their life-jackets), one of the Senegalese nationals, Mr. Sonko, died by drowning. Thus, the Committee concluded that Spain had violated articles 12 and 16 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT) for not having adequately protected Mr. Sonko's right to life and personal integrity, which amounted to ill-treatment under the Convention, as well as his family's right to due process, for not having properly investigated the circumstances of presumable ill-treatment surrounding Mr. Sonko's death.⁷⁹⁶

The fact that Mr. Sonko was alive and well when intercepted by the Civil Guard and dead when he arrived on the Moroccan coast under the control of the same authority, brought the Committee to consider that there was a causal link between these two facts, given that these undocumented migrants were under Spain's jurisdiction -understood as effective control under International Law (para. 10.3)- when these events took place.

Applying a similar criteria to the one used by the ECHR and the IACHR in *Opuz v. Turkey* and *Cotton Field v. Mexico*, analysed above in Chapter III, the UN Committee Against Torture shifts the burden of proof to the State, and asserts that because of the absolute nature of the legal prohibition of ill-treatment, it is for Spain to prove that it protected the victim's personal integrity, and not inversely, for the victim's family to prove that the State was responsible for Mr. Sonko's death by drowning. Indeed, the failure of the Spanish State to guarantee the safety and integrity of the persons under its jurisdiction amounted, according to the Committee, to a violation of its obligation to duly protect them from ill-treatment under the CAT, a reinforced obligation in view of the fact of Mr. Sonko's *particular vulnerability as a migrant* (para. 10.4).

This level of vulnerability and the corresponding State obligations concluded in this case remind us of the position adopted by the UN Committee on ESC Rights which details the circumstances in which a *reversal of the burden of proof* is allowed or even called for. As reviewed above, States are under a legal obligation according to the ICESCR to use the maximum of its available resources to assure rights, privileging the most vulnerable groups and those with the most urgent needs. In this respect, diligence in the adoption of these measures cannot be presumed and States must demonstrate the steps they are taking to prioritize the protection of at least the minimum core of such rights even in time of crisis or resource constraints.⁷⁹⁷ Note the similarity between the language of 'minimum core' of rights used by the Committee and that of the 'vital core' of all human lives as proposed by the human security definition. On the other hand, as Gerardo Pisarello has signalled referring precisely to the case of migrants and in line with the Committee, the existence of an asymmetric relationship of subordination and defencelessness between two subjects, individual or collective, authorizes for the reversal of the burden of proof in the case of a presumed violation of a right. In this sense, he has considered ESC Rights as freedom rights, borrowing partly from Amartya Sen's idea of development as freedom, insofar as the lack of their enjoyment in an extreme degree leads to the annulment of freedom.⁷⁹⁸ Thus the importance of prioritizing attention to the most vulnerable persons, who are

⁷⁹⁶ UN Committee Against Torture, CAT/C/47/D/368/2008, January 27, 2012, paras. 10.6-10.8.

⁷⁹⁷ See article 2.1 of the ICESCR and UN Committee on ESCR, General Comment No. 3 *The nature of States parties obligations* (Art. 2, par.1 of the Covenant), 14 December 1990 (contained in Document E/1991/23), paras. 10-13.

⁷⁹⁸ Pisarello, Gerardo, "Los derechos humanos de los migrantes", in Añón, María José (editor), *La universalidad de los derechos sociales: el reto de la inmigración*, op. cit., 2004, pp. 58 and 70.

placed at a higher risk of violation of their human rights. The notion of human security helps to highlight this condition of risk and vulnerability in a way that is relevant for the law, as revealed through the analysis of the cases above.

2. Non-human security sensitive cases

Other examples can be given as to what are the consequences of disregarding a human security perspective to the legal analysis of human rights violations in the area of human rights of migrants:

- A. The case of *N. v. United Kingdom*,⁷⁹⁹ decided by the ECHR, involved a Ugandan woman who had arrived to the UK on a false passport and, although she did not know it at the time, was HIV-positive. In the UK she had received life-sustaining medical treatment that would purportedly allow her to live “for decades”. N had been rejected as asylum seeker and if she were to be deported back to Uganda, there was strong evidence to estimate, due to the lack of her anti-retroviral drugs in the Ugandan health system, that she would die within two years of her return. The Court concluded that the removal of N to Uganda would not entail a violation of the *non-refoulement* obligation contained in article 3 of the European Convention prohibiting removal of a person in case of risk of torture or cruel, inhuman or degrading treatment.⁸⁰⁰

Some of the criticisms against this sentence have been countered stating rather dismissively that “Disappointing to many as this case may seem, it is in line with earlier case law to a great extent. In fact, the Court has held only once in a health case context, in a case of an applicant with HIV/AIDS who would be sent back to the tiny island of St. Kitts (*D. v. the United Kingdom*), that Article 3 would be violated if the applicant would be expelled”.⁸⁰¹

However, the Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann in the case of *N. v. UK* expressed its concern with the Court taking a different stand in this case than in the analogous judgment of *D. v. United Kingdom*, issued more than ten years before. In that case involving an applicant with HIV/AIDS who would be sent back to St. Kitts where he would be left deprived of health care and moral support, the Court declared that Article 3 would be violated if he would be expelled given he was at a “critical stage” of illness.⁸⁰² The Dissenting Judges argued that in fact the case of *N. v. UK* -in which the applicant “with no doubt” would face “an early death” at return to Uganda- was not different in its extreme circumstances to *D. v. UK*. In a view in line with human security-sensitive perspective, they concluded that “finding a potential violation of Article 3 in this case would not have been an extension of the exceptional category of cases which is

⁷⁹⁹ ECHR, *N. v. United Kingdom* (GC), App. No. 26565/05, 27 May 2008, paras. 18 and 19.

⁸⁰⁰ See the analysis of the *N. v. UK* Case in Barak-Erez, Daphne & Aeyal M. Gross (editors), *Exploring Social Rights: Between Theory and Practice*, Hart Publishing, 2007, p. 192; and in Langford, Malcolm, *Social Rights Jurisprudence*, *op. cit.*, p. 288.

⁸⁰¹ ECHR Blog, Grand Chamber Judgment in *N. v. UK*, Wednesday May 28, 2008, available at http://echrblog.blogspot.com.es/2008/05/grand-chamber-judgment-in-n-v-uk_28.html For a more detailed overview of the Court's case law on the issue of expulsions of persons with health problems under Article 3 ECHR, see: Veelke Derckx, 'Expulsion of illegal residents (aliens) with medical problems and Article 3 of the European Convention of Human Rights', in the *European Journal of Health Law*, vol. 13, 2006, pp. 313-319 (electronic access e.g. through Ingenta Connect)

⁸⁰² ECHR, *D. v. the United Kingdom*, Appl. No. 30240/96, 2 May 1997.

represented by *D. v. the United Kingdom*...The distinguishing of the present case from that of *D. v. the United Kingdom* is thus, in our opinion, misconceived”.⁸⁰³

They also emphasized their grave preoccupation with the Court’s balancing exercise when dealing with Article 3, a non-derogable right containing a prohibition of an absolute nature and, thus, not subject to “a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”, as the Court had carried out with respect to N.’s case;⁸⁰⁴ a balancing that the same Court had actually explicitly prohibited three months before in *Saadi v. Italy*.

In analysing the validity of returning very ill persons to countries with poor healthcare facilities under a (gendered) human security/human rights lens that highlights the transnational dimensions of the issue, several reflections may be spelled out. As Eva Brems puts it, this type of case

reveals an uncomfortable truth about the limits of the human rights commitment of European states. Like other rich states with long democratic traditions, they like to insist on the universality of human rights vis-à-vis less democratic (and often poorer) other states. Yet in transnational situations, their formal commitment to universal human rights is upheld only thanks to barely credible legal wriggling ... [and] a legal reasoning that allows them to wash their hands in innocence. The dissenters brilliantly pierce through this legal fiction.⁸⁰⁵

Indeed, the Dissenting Judges brilliantly uncovered the real fear of the majority when they clarified that the claim had not been articulated that Article 3 places “an obligation on the Contracting State to alleviate ... disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction”, as the majority had affirmed. The Judges highlight that “the view expressed by the majority that such a finding ‘would place too great a burden on the Contracting States’...reflects the *real concern* that they had in mind: if the applicant were allowed to remain in the United Kingdom to benefit from the care that her survival requires, then the *resources of the State* would be overstretched”. And they firmly rebut by emphasizing that such a consideration “runs counter to the absolute nature of Article 3...and the very nature of the rights guaranteed by the Convention that would be completely negated if their enjoyment were to be restricted on the basis of *policy considerations* such as budgetary constraints”. And they also reaffirm the absolute nature of the protective status of Article 3 when countering the underlying belief of the majority that “the implicit acceptance...of the allegation that finding a breach of Article 3 in the present case would open up the *floodgates to medical immigration* and make Europe vulnerable to becoming the “sick-bay” of the world”. In adopting an

⁸⁰³ Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann in ECHR, *N. v. United Kingdom*, *op. cit.*, paras. 23 and 24.

⁸⁰⁴ *Ibid.*, para. 7. See also para. 44 of the judgment. See also a comparative examination of the two cases in this sense in Dauvergne, Catherine, *Making People Illegal: What Globalization Means for Migration and Law*, Series The Law in Context, Cambridge University Press, 2008, pp. 164-167.

⁸⁰⁵ Brems, Eva, “Thank you, Justice Tulkens: A comment on the dissent in *N v UK*”, in *The Strasbourg Observers*, August 14, 2012, available at <http://strasbourgobservers.com/2012/08/14/thank-you-justice-tulkens-a-comment-on-the-dissent-in-n-v-uk/>

evidence-based approach, the Dissenting Judges underline that “the so-called “floodgate” argument is totally misconceived”.⁸⁰⁶

It may be added that in viewing the two cases with similar conditions under a gendered perspective, one may note that both in the previous case of *D. v. UK* and the latter one of *Kiyutin v. Russia* (reviewed above in the previous line of illustrative cases), the individuals that received protective judgments were both men, whereas in this case N., a woman, was denied the Court’s safeguard. It must also be noted that she had escaped Uganda on the account of having been ill-treated and raped.⁸⁰⁷ Under a gendered and human security lens, not only the structural implications of HIV/AIDS in the African context were overlooked, but also the differentiated impact the virus and its manifestations hold for women specifically within a context of discrimination and violence against women,⁸⁰⁸ as viewed in Chapter III of this thesis.

As the human security framework invites us to do, let us duly recall the broader structural issue at stake, in this case affecting N. as an individual but derived from a global challenge. Indeed, emphasis must be made on the fact that HIV/AIDS has become not only a global health problem, but also an economic development crisis because of the vast socio-economic impact HIV/AIDS has had and continues to present in developing countries, especially those in sub-Saharan Africa. Since 2001, the UN Secretary-General had argued that

acquired immunodeficiency syndrome (AIDS) has become a major development crisis...In the hardest hit regions, AIDS is now reversing decades of development...By eventually impairing economic growth, the epidemic has an impact on investment, trade and national security, leading to still more widespread and extreme poverty. In short, AIDS has become a major challenge for *human security*.⁸⁰⁹

Relating this global context with the legal analysis of this case, Eve Lester has argued that a different result could have been reached by the Court had it applied a ‘human security approach’ that emphasized the critical life-threatening risk N faced, viewed in the light of complementing article 3 in light of the core content of the human right to the highest attainable standard of health.⁸¹⁰ Moreover, “judicial decisions that integrate human security

⁸⁰⁶ Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann in ECHR, *N. v. United Kingdom*, *op. cit.*, para. 8.

⁸⁰⁷ ECHR, *N. v. the United Kingdom*, *op. cit.*, para. 10.

⁸⁰⁸ See Ssenyonjo, Manisuli, “Human Rights of Women in Africa: A Prerequisite for Human Security”, in *Protecting Human Security in Africa*, edited by Ademola Abass, Oxford University Press, 2010, taken from OXFORD SCHOLARSHIP ONLINE (www.oxfordscholarship.com). See also Statement by the African Union Chairperson, Professor Alpha Oumar Konare in Celebration of the International Women’s Day of 8 March 2007.

⁸⁰⁹ *Special Session of the General Assembly on HIV/AIDS: Report of the Secretary-General*, UN GAOR, 55th Sess., Agenda Item 179, A/55/779, 2001, pp. 4 and 6. In this line, for an analysis of whether placebo-controlled trials violate international human rights law within the context of the relationship between developed and developing countries, see Fidler, David P., “‘Geographical Morality’ Revisited: International Relations, International Law, and the Controversy over Placebo-Controlled HIV Clinical Trials in Developing Countries”, 42 *Harvard International Law Journal*, 299, Summer 2001, available at <http://0-www.lexisnexis.com.biblio.eui.eu/hottopics/lnacademic/?verb=sr&csi=143840>

⁸¹⁰ The concrete aspects of the right to health considered part of the ‘Core Obligations’ of States have been laid out by the UN Committee on ESC Rights in its General Comment No. 14, *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, *op. cit.*, paras. 43-45.

into their analysis may compel states to translate their rhetoric into real deliverables which would increase accessibility and availability of anti-retroviral drugs in the developing world where the full burden of the HIV/AIDS pandemic is yet to be felt”.⁸¹¹ Maybe such an outlook by the Court would have truly lived up to the commitment of guaranteeing N’s human right to health and ultimately her right to life in the face of an imminent risk of losing it.

- B.** An issue involving some common denominators with *N. v. UK* was resolved similarly by the ECHR in *Nacic and Others v. Sweden*, in May 2012. The case refers to the situation of a family of Roma ethnicity from Serbia (in the Kosovar region) who migrated to Sweden as a result of the armed conflict and at the time of the case, some of its members faced possible deportation. One of the family members was a young man in need of mental health care with a previous history of attempted suicide.

In this respect, the Court evaluated their situation first under Article 3 on the right to be free from inhuman or degrading treatment and the right of *non refoulment* in the face of a risk of encountering such treatment. In following the previous judgment of *N v. U.K.*, the Court not only analysed the situation of the individual applicants, but actually laid down the “general principles” governing expulsion of aliens in cases of risk based only on that sole case. The ECHR considered that

Aliens who are subject to *expulsion* cannot, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to *benefit from medical, social or other forms of assistance* and services provided by the expelling State. The fact that the applicant’s circumstances, including his *life expectancy*, would be *significantly reduced* if he were to be removed from the Contracting State is *not sufficient* in itself to give rise to a breach of Article 3. The decision to remove an alien who is suffering from a *serious* mental or physical illness to a country where the facilities for the treatment of that illness are *inferior* to those available in the Contracting State may raise an issue under Article 3, but only in a *very exceptional case*, where the *humanitarian grounds* against the removal are *compelling*.⁸¹²

One wonders if the grounds evaluated in the present case were not compelling enough, or how grave the circumstances would have to be for the Court to consider protecting persons previously recognized in its case-law as “vulnerable” when placed in an even more “serious” situation of precariousness.

The Court also analysed the case under Article 8 a measure interfering with rights guaranteed by Article 8.1 of the Convention (right to private and family life) could be regarded as being ‘necessary in a democratic society’ if it had been taken “in order to respond to a pressing social need and if the means employed are proportionate to the aims pursued. The national authorities enjoy a certain margin of appreciation in this matter. The

⁸¹¹ Lester, Eve, “Socio-economic rights, human security and survival migrants: Whose rights? Whose security?”, in *Human Security and Non-Citizens: Law, Policy and International Affairs*, *op. cit.*, p. 354. For the detailed analysis of this case, as well as the similar case of *D v. United Kingdom* under the human security notion, see the whole chapter, pp. 314-356.

⁸¹² ECHR, *Nacic and Others v. Sweden*, Appl. No. 16567/10, 15 May 2012 (Final 24 September 2012), para. 49.

Court's task consists of ascertaining whether the impugned measures struck a fair balance between the *relevant interests*, namely the individual's *rights* protected by the Convention on the one hand and the community's *interests* on the other". The Court further noted that both the Swedish Migration Court and the Migration Court of Appeal came to the conclusion that the third applicant (the young man of 21 years of age at the time of the case) could receive adequate medical care in Kosovo and Serbia. In this connection, the Court observed that mental health care is available in Kosovo and Serbia; albeit still under reconstruction and not of the same standard as in Sweden.⁸¹³

Referring to the young man's condition, the Court observed that he had lived in Sweden with the other applicants since 2006 and that according to the most recent medical certificate, dated June 2011, he had begun to feel better since being granted a residence permit. He had left the treatment centre and moved to an apartment. He had also begun studies at a college for adults. However, his positive development had been halted by the *threat of disruption of the family* and he had showed signs of falling back into *depression*. While acknowledging that this information is worrying, the Court found that it had to be taken into account that the medical certificate mainly contained a description of how the applicant himself feels and that it neither suggests that he currently had a medical condition, nor that he was undergoing psychiatric or other treatment. In the Court's opinion, the medical certificate also indicated that his state of health was connected to a large extent to the situation he was in at the moment of the case and deemed there had been no further deterioration of his health since June 2011,⁸¹⁴ although this fact was precisely connected to having been granted the residence permit, as the medical certificate itself indicated, and presumably to the possibility of thus living *free from fear*, to employ human security language.

After noting that that the applicants would be confronted with general difficulties as Roma people in Kosovo and Serbia, including their access to medical care, the Court surprisingly finds that the general situation in Kosovo and Serbia is not sufficient to conclude that people of Roma ethnicity cannot be sent there. In a very unfortunate move, in my understanding, the Court reached an outcome that left the applicants completely unprotected, by concluding that "having regard to all the circumstances and taking into account the margin of appreciation afforded to States under Article 8.2 of the Convention, the Court considers that the Swedish authorities did not fail to strike a *fair balance* between the *personal interests* [note that it does not say the 'rights'] *of the applicants as regards their family life* on the one hand and to ensure an *effective implementation of immigration control* and *hence* to preserve the *economic well-being of Sweden* on the other". It thus concluded that there was no violation of Articles 3 and 8 of the Convention.⁸¹⁵

The Court's reasoning is, in my view, deeply problematic. First, the judgment seems to equate or to confuse "interests" with "rights" in some instances, or to openly only speak of interests when referring to individual rights. The text of the Convention in Article 8 protects the "right" to private and family life, to be weighed by the State against certain "interests". In this respect, the interest of the economic well-being of the country is a legitimate aim that may be considered necessary in a democratic society (Article 8.2).

⁸¹³ *Ibid.*, paras. 80 and 83.

⁸¹⁴ *Ibid.*, para. 84.

⁸¹⁵ *Ibid.*, paras. 87-88. Emphasis added.

However, the assumption of the Court of unquestionably establishing a causal link between effective immigration control and the economic well-being of a State presents many doubts as to its empirical grounding, or at least, none is provided to support this argument. This “flood-gate” argument fearing for the economic sufficiency of the State seems to be completely out of place in a judicial body that is evaluating if a human rights violation has taken place or is at risk of occurring, as in this case.

At the same time, it is true that immigration norms are “prescribed by law” in Sweden, and in that sense under a very broad view the formal requirement for a justified interference with family life is met, as prescribed also by article 8.2. When applying a human security lens, though, the links between immigration law and possible human rights violations become evident, as signalled above. What is precisely sought for from the Court is for it to be the adjudicator of individual human rights put at risk by such immigration law and policy. This is so especially in facing persons in *vulnerable conditions* such as Roma people and persons with mental health problems (two groups actually recognized as particularly vulnerable previously by the Court),⁸¹⁶ and more particularly against the background of *systemic risks* to be confronted by persons upon return to their country of origin, in this case, in access to the health system in Kosovo or Serbia.

If a human security lens had been applied to this case, the Court would have, on the one hand, given a different weight to the fact that the applicants “under tremendously difficult circumstances, managed to maintain their essential bond as a family unit”, as the Partially Dissenting Judges Spielmann and Power-Forde did. The Judges also argued that the applicants were “of Roma ethnicity and have the *added vulnerability* of mental health problems”.⁸¹⁷ And on the other hand, it would have also given due consideration to the potential risk of violation of the right to be free from inhuman or degrading treatment (in ideal thinking viewed also in its relation to the right to health, even if only as a persuasive argument), analysed on its own or coupled with the right to non-discrimination, to be suffered by the applicants upon return. In any event, in my understanding, the validity of a State decision to deny a residence permit and consequently to deport the applicants, should have been evaluated in light of the possible violations of articles 3 and 8 on their own footing, and not under the argument of “effective implementation of immigration control”.

In this respect, the IACHR’s AO 18/03 comes to mind, in the point emphasized since 2003 in the sense that “States may not *subordinate* or condition observance of the principle of equality before the law and non-discrimination to achieving their *public policy goals*, whatever these may be, including those of a *migratory character*”.⁸¹⁸ Of course, the views of the IACHR are not binding for the ECHR, but it is suggested that the Court could possibly benefit from reviewing such arguments which hold an authoritative character

⁸¹⁶ See Möschel, Mathias, *op. cit.* and Timmer, Alexandra and Lourdes Peroni, *op. cit.*

⁸¹⁷ ECHR, *Case of Nacic and Others v. Sweden*, *op. cit.*, Partially Dissenting Opinion of Judges Spielmann and Power-Forde, para. 2.

⁸¹⁸ IACHR, AO 18/03, *Juridical Condition and Rights of Undocumented Migrants*, *op. cit.*, concluding para. 11. Emphasis added. For argumentation see para. 172. This point of the AO 18/03 on the legitimacy of public policy objectives measured in the light of the principle of equality and non-discrimination was used as a source of analysis of the controversial Bossi-Fini Law on migration measures in Italy; see Tramontano, Mario Umberto, “Is the Bossi-Fini Law (L.189/2002) in compliance with arts. 2 and 26 of the International Covenant on Civil and Political Rights?”, p. 8, available at <http://es.scribd.com/doc/63794132/Is-the-Bossi-Fini-Law-in-Compliance-With-Arts-2-and-26-of-the-International-Covenant-on-Civil-and-Political-Rights>

given they are based on one of the few comprehensive studies done at the judicial level on the legal obligations of States regarding human rights of migrants, and in that sense, a useful source of legal analysis and one of the recent developments of international human rights law more generally.

Turning back to the ECHR, it should be noted that the Court in analyzing the mentioned case of *Nacic and Others v. Sweden*, while relying on reports by the World Health Organization to assess the country's situation relating to human rights' respect and protection, did not pay any regard to reports by human rights monitoring bodies (as it had done in other cases of evaluation of general country situations),⁸¹⁹ or to reports by civil society organizations in Kosovo or Serbia (as it had done in previous cases relating to violence against women studied in Chapter III above), in order to properly evaluate the problems faced in relation to human rights of persons with mental disabilities in the health system of such countries. Thus, the human rights and human security of the applicants were left unprotected, and what does seem most likely sure is that they returned to face critical conditions of vulnerability.

As a corollary to this section on non-human security sensitive cases concerning migrants, it should be pointed out that there are other recent cases that seem to point to a certain harshening of the ECHR's position towards the rights of potential refugees that could possibly, and unfortunately, be explained within the recent trend of increasingly restrictive immigration policy in the EU and Member States. For instance, in another case of 2012 also against Sweden, the 'Opuz line' of reasoning regarding violence against women, as reviewed in Chapter III of this thesis, was left aside.

In *A.A. and Others v. Sweden*, the case involved women from Yemen who had already been victims of family violence in their country and were seeking asylum in Sweden, being denied such protection by the Court –surprisingly so in the context of the Arab Spring and to the dismay of Judge Ann Power-Forde as expressed in her Dissenting Opinion.⁸²⁰ As a different feature to *Opuz v. Turkey*, this case would also demonstrate an added 'intersectional vulnerability' of these women on account of their gender coupled with their condition of non-citizens, particularly of asylum seekers recognised as a vulnerable group previously by the Court, as reviewed above; an element of intersectionality that was overlooked by the Court. Indeed, it comes off as quite striking in and of itself that these Yemeni women were left without due protection, and considering as well the broader context of the recent adoption in 2011 of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, specifically directed, among other goals, to protecting migrant women as one of the most vulnerable groups in Europe, as reviewed in Chapter III above. One can only hope the Convention's provisions translate into reinforced protection for anyone and everyone under the jurisdiction of European States, and that

⁸¹⁹ See for example ECHR, *N. v. Finland*, *op. cit.*, where the Court refers to the existence of "credible and objective human rights reports" as a necessary source for proper evaluation, para. A.1.136. In a previous case, the Court also considered the general human rights situation of Colombia; see ECHR, *H.L.R. v. France*, *op. cit.*, although in that case, as was reviewed above, it concluded that there had been no violation by France of article 3. Recall also the case of *Sufi and Elmi v. the United Kingdom*, addressed in the section of ESC Rights above, where the Court dedicated more than a hundred paragraphs of its judgment to carefully carry out a detailed, evidence-based and responsible assessment of the country situation of Somalia in light of the risk of suffering torture or ill-treatment confronted by the applicants.

⁸²⁰ ECHR, *A.A. and Others v. Sweden*, Appl. No. 14499/09, 28 June 2012 (Final 28 September 2012). In relation to the recent seemingly harshening position of the Court, see also *Trabelsi v. Germany* analysed above.

when this is not the case, the ECHR can duly open its eyes to the more ample background, as it has done in other instances, and firmly play its role as a last chance mechanism for persons to receive a protective safeguard of their rights, especially those persons in conditions of vulnerability.

Let us now turn to unfold some of the conceptual reflections and practical results that can be derived from the above examined cases and the analysis of the present chapter.

IV.5 Some conclusions on human security and universal human rights of undocumented migrants: the right to have access to rights

From the illustrative cases reviewed above, we can observe that an enhanced and integrated approach to the State's positive obligations would follow when applying a human security perspective. This may be done through utilizing the human security lens to review collective threats that facilitate human rights violations of individual persons. It also involves a procedural shift for human rights courts in opening up to new and non-traditional means of evidence such as reports of Non-Governmental Organizations, UN and regional bodies, UN and regional human rights mechanisms, national/local human rights institutions, and even news reports, and it translates as well into closer dialogue and cross-referencing between them, in a more fluid and attentive method of documenting the widespread and systemic character of vulnerabilities placing human rights at risk or actually violating them.

At the same time, the human security-sensitive cases, and their contrast to those not adopting a human security-based approach, bring to light an array of *interpretative synergies* that the human security/human rights interaction may allow for when assessing, in this case, the rights of undocumented migrants and other non-citizens. Those synergies, to be developed more in detail in the following chapter, may also represent a parameter of reference for evaluating when a legal or judicial decision -or even a legally relevant action or omission of powerful entities more generally- is embodying a non-human security sensitive perspective.

The cases, coupled with the empirical realities faced by undocumented migrants and depicted throughout this chapter, reveal an extreme collective vulnerability to human rights violations of undocumented migrants that is insufficiently addressed by international human rights law. On the other hand, the reflection may be made that asylum seekers enjoy a legal construction allowing them to be in the territory of the host State that would theoretically render them more protected than undocumented migrants. However, with the growing mixed flows of migrants in the midst of an economic crisis, particularly in the case of the US and Western Europe, the cases also reveal an increasing vulnerability affecting asylum seekers in analogous ways to that placing undocumented migrants at risk. As an afterthought having examined the cases, it may be paradoxically true as well that undocumented migrants by remaining in clandestinity are actually achieving a self-preservation objective, whereas asylum seekers by actually requesting refuge ignite their visibility and position themselves in the hands of the State, who, as is frequently revealed, adopts an indifferent or harmful stand towards their human rights and security.

It has been argued that assuring the human rights of undocumented migrants and other non-citizens is one of the most challenging situations for contemporary international law. In theoretical terms it places a test on the applicability of the principle of universality of human rights to

undocumented migrant persons. Indeed, the cosmopolitan promise of international human rights law is put to trial. And in practical terms it is a challenge because of the status of undocumented migrant as one of the greatest sources of vulnerability and human insecurity in our world today.

As portrayed in this chapter, we confront a globalised political economy that promotes the free movement of goods and services but constrains the free movement of persons, especially of a certain type of persons based on racialised and socio-economic terms, submitting them to the economic and labour needs of the market. In several democratic settings, irregular migratory status is the one exclusionary category left alive almost untouched. These exclusionary categories created by the State's immigration laws and policies, those deriving from regional normative systems such as the EU, and some of the provisions of international law itself, permit and shape the experience of human insecurity of migrant persons and non-citizens. It often ranges from the weak status of enjoyment of human rights, to suffering their violation, and finally to fearing or in fact confronting the lack of a political and legal framework to exercise the right of access to justice to seek redress. This constructed vulnerability and the 'legal limbo' it entails also bring the spotlight to the rights of the 'other', the most diverse 'other' today being the non-citizen, more concretely the undocumented migrant, as her difference is not only ethnic, cultural, or social, but rather it is an 'otherness in rights'. Because of the increasing legally institutionalised articulation of distinction through irregular migratory status, the right to have rights, to paraphrase Hannah Arendt,⁸²¹ still remains a door to be opened for millions of migrant persons worldwide.

⁸²¹ Arendt, Hannah, *The Origins of Totalitarianism*, A Harvest Book, San Diego, New York, London, 1951, pp. 296-297.

Chapter V. Conclusions and prospective routes

If we envision the law as a living phenomenon and -especially in democratic regimes- as a dialectic process potentially embodying values towards the common good, the prospective of human security and human rights as modes of emancipation becomes clear. The possibilities of the law in this field, particularly through international law, to address structural problems or to tackle ‘small-scale’ injustices, emerge as a very real and tangible path. Before each one lie the diverse roads in which we wish to transit our life of legal academia and practice, a path that inevitably will also impact on other human beings’ lives.

It has been argued in this text that the human security-human rights symbiosis holds promise for more expansive and integrated legal interpretations⁸²² that result in increased protection for persons and groups in their everyday lives, especially those in conditions of vulnerability. Through the research this thesis arrives at a series of conclusions on how this may be rendered possible.

V.1 Conceptual conclusions

In **Part 1** of this thesis, it was shown that different elements of human security -as articulated in its modern form by the UNDP’s 1994 *Human Development Report* and the 2003 report by the UN-backed independent Commission on Human Security, *Human Security Now-*, have been analysed on their own footing and expressed in guidelines with normative content or in full legal documents. Such are the cases of environmental security, personal security, social security or food security. This seems to be in line with the direction several global, regional, sub-regional and inter-governmental organizations have taken since the 1970s such as the OSCE. A similar process may be observed throughout the last twenty years after the 1994 UNDP Report and more recently: the Central American Security Commission, the OSCE, the EU, the OAS, ASEAN, the AU, ECOWAS, the OECD and the World Bank (roughly in that chronological order) have emphasized and progressively engaged in actions on the links forming the triangle of security, development and human rights. Institutional arrangements at the national and local level, as well as numerous initiatives by civil society actors and academic institutions have directed their attention to the human security proposal, as detailed in the first Chapter of this text.

The successes attributed to the human security agenda by the governments and activists that support it, include the agreement of the 1997 Mine Ban Treaty, the Ottawa Convention, not by chance promoted by and signed in Canada, one of the main human security advocates.⁸²³ Some accounts also refer to the adoption of the 1998 Rome Statute and the subsequent creation of the

⁸²² On the *integrated approach* to human rights, see for more detail Krause, Catarina and Martin Scheinin, “The Right Not to be Discriminated Against: The Case of Social Security”, in Orlin, Theodore, S., Allan Rosas and Martin Scheinin (editors), *The Jurisprudence of Human Rights Law: A Comparative and Interpretive Approach*, Institute for Human Rights, Åbo Akademi University, Turku/Åbo, Finland, 2000, p. 255.

⁸²³ See Edwards, Alice, “Human security and the rights of refugees: transcending territorial and disciplinary borders”, in *Michigan Journal of International Law*, Vol. 30, no. 3, 2009, pp. 772-773. See also Alcalde Villacampa, Javier, “The Mine Ban Treaty, New Diplomacy and Human Security Ten Years Later”, Book reviewed: Williams, Jody, Mary Wareham and Stephen Goose (editors), *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security*, *op. cit.*; and more generally Anderson, Kenneth, “The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations, and the Idea of International Civil Society”, in *European Journal of International Law*, Vol. 11 No. 1, 2000, pp. 91-120.

International Criminal Court as influenced by human security goals.⁸²⁴ Several actions building on the three humanizing discourses of human rights-development-and security have been promoted by multiple actors, Japan being one of the main state proponents, and informal government networks such as the Human Security Network or the Friends of Human Security, have also constructed strategic partnerships to further these goals, not less so with the UN itself, who coordinates through OCHA the Trust Fund for Human Security, one of the funds with the largest budgets of all of the UN organization.

Turning to the specific field of international human rights law as the central focus of this text, it may be highlighted that some of the seven different categories of human security identified by the UNDP in 1994, already reflected existing human rights law when formulated, such as the right to personal security, social security or security in tenure. Since then, other human security concerns have been further articulated in the language of human rights. Recent examples may be found in the right to food security or the right to peace for women, in the 2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa; or the humanitarian and poverty-related concerns explicitly framed as human security priorities in the binding Framework Treaty on Democratic Security in Central America of 1995; or the connection of human security to specific human rights, as elaborated in the 2009 *Report on Citizen Security and Human Rights* by the Inter-American Commission of Human Rights (IACoHR).

In Chapter I, the text weaved together some of the main views and uses of human security from the fields of development, political science, international relations, critical security studies and international law, and provided a richer and more complete narrative of the history of the notion, to then narrow the focus to the international legal dimensions and expressions of human security. Against the ample background of diverse political and legal expressions of human security, the UN General Assembly (UNGA) considered human security as a 'right' in the 2005 *World Summit Outcome* and derived from that, discussed a 'common understanding' of human security picked up in 2012 in the *UN Secretary General's Second Report on Human Security*. The report was presented to the UNGA last April 2012, debated by this body in June 2012 and endorsed by it in October 2012. Current debates on the right to peace within the UN Human Rights Council also incorporate features of this understanding and recognize "a right to human security" within the right to peace of persons and peoples.

This thesis has defended the idea that *all* human rights –civil, political, economic, social and cultural- should be considered within the human security conception (as confirmed by the UNGA's most recent position) and only differentiated or prioritized according to identifiable and identified levels of risk and vulnerability on a context-specific basis.

In this respect, the 2012 UNSG's Report and the UNGA's stand adopt a stronger legal human rights' basis to ground the idea of human security than that contained in the 1994 UNDP and the

⁸²⁴ As described in Chapter I, the Human Security Network of 13 countries led by Canada, promoted since its creation in 1999 the universalization of the Ottawa Convention and the establishment of the International Criminal Court. Navi Pillay, UN High Commissioner for Human Rights, in alluding to the universalist and protective language of the preamble of the Rome Statute, considered as one of the three main potential impacts of the ICC on the international system, the role of the Court in contributing "to peace and security, including *human security* -given that the grave crimes under its jurisdiction are conducts that 'threaten the peace, security and well-being of the world' "; "The ICC in the International System", Remarks delivered during the event 'Retreat on the Future of the International Criminal Court', Liechtenstein, 17-18 October 2011, (emphasis added); available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11562&LangID=E>

2003 reports. The research has shown, however, that at this point it seems clear that at the UN level, the notion of human security will formally remain as a policy framework or at most, viewed in terms of positive law, as a semi-legal figure. From a broader normative perspective the thesis demonstrates it may act as an orienting notion with legally relevant content that pushes for expanding the boundaries of international law. This emerging legal configuration would promote the inclusion of central elements of human security in legal instruments, even if not mentioning the term as such, or the interpretation and further development of existing international legal obligations -mainly in the field of human rights and refugee law, and to some extent in humanitarian and criminal law- in order to promote coordination and partnerships to address widespread threats in a coherent manner and build resilience to confront them. Of course, nothing prevents the possibility of human security complementing and informing legal interpretation at the UN level more decidedly, particularly in the actions of human rights bodies and mechanisms. On the other hand, proof presented in this thesis indicates that at the regional levels human security does indeed play a legal role in various settings.

The main focus of this thesis has not been to defend the (absolute) legal character of human security or even the desirability of this possibility in all scenarios, but rather to map and evaluate critically its current articulation and standing in public international law, including some of its legal expressions at the regional levels, particularly in international human rights law. Inversely, some ways in which human rights law, standards and indicators could contribute to better define the scope of human security have also been identified. In this sense, the human security-human rights framework advanced in this work has attempted to create “categories of challenge” that shift our understanding of the facilitating conditions of human rights violations and consequently open paths for alternative legal interpretations of such rights and the corresponding obligations.⁸²⁵ It is not human security or human rights acting alone, it is the compounded collaboration between them that holds promise for more effective protection of persons and groups.

Thus, the links between human security and human rights have been made visible through the element of *risk or vulnerability*, analysed as well in its legal dimension, with a particular and cross-cutting emphasis throughout the whole thesis on the vulnerabilities severely affecting economic, social and cultural rights (ESC Rights) and facilitated by conditions of extreme material deprivation and social marginalization. Indeed, as recalled at the start of this research, “matters of world poverty, inequality and development...are (also) matters of ‘international law and human rights’ ”.⁸²⁶

At this junction human security comes forward as a concept that may better capture the breadth and width of the relationship between equality, dignity and socio-economic vulnerability and transcend the traditional human rights divide of civil and political/economic, social and cultural rights. Through emphasizing the interrelated risk factors and vulnerabilities affecting *all* human rights, the lack of enjoyment of civil, political, economic, social and cultural rights and the structural obstacles to their full realisation become security concerns for the state. The human security perspective carries potential as well for addressing other actors contributing to these risk-producing barriers, such as private actors and family members in cases of violence against women, or unscrupulous recruitment agencies, human smugglers, companies or employers in the case of undocumented migrants.

⁸²⁵ I borrow this term from the suggestion by Charlesworth, Hilary, Christine Chinkin and Shelley Wright, “Feminist Approaches to International Law”, in *The American Journal of International Law*, *op. cit.*, pp. 643-645.

⁸²⁶ Salomon, Margot E., “The future of human rights”, in *Global Policy*, Volume 3, Issue 4, November 2012, p. 455.

Hilary Charlesworth, Christine Chinkin and Shelley Wright years ago invited us to consider women, half of the world's population that had been silenced, marginalised or rendered invisible by the structures of international law. They proposed to do it by shifting the boundaries of this field of law through a feminist approach.⁸²⁷ Indeed, international law may be limiting but also transformative. In this sense, the thesis has approached international law, and in particular international human rights law, building on feminist theory and jurisprudence. As its title itself signals, this thesis also sides with social justice approaches and with alternative positions of the 'law in context' as a movement destined to broaden the study of law and legal phenomena through reviewing them critically in their social, political, economic and historical settings.⁸²⁸ At the same time, this text has offered encouragement as to the possibilities of extending the boundaries of international law through the human security notion. In contributing to identify categories of vulnerability, the human security perspective provides for criteria to trigger and reinforce the state's (or other actors') human rights obligations to *prevent, address and remedy* violations.

Human security emphasizes the twin pillars of *protection* and *empowerment* with the same force, both relevant not only from a conceptual, but also from a strategic perspective. "People protected can exercise choices. And people empowered can make better choices".⁸²⁹ In its axis of *protection*, the 'top-down' approach, it reinforces the role of the state as the primary duty-bearer in the protection of persons in conditions of vulnerability, therefore moving in line with traditional principles of human rights law. At the same time, the notion does not lend itself only to the classical positioning of the state as the sole relevant actor in charge of human rights fulfilment. Rather, it proposes a parallel and complementary line of re-thinking schemes for the better protection of rights and security: by emphasizing 'bottom-up' construction through its element of *empowerment*, it echoes feminist discourse and opens up this second pillar as a wide-ranging condition necessary for realizing human security for vulnerable, silenced or destitute persons and groups more generally, such as undocumented migrants. Indeed, empowerment, in stressing the necessity of access to information and genuine participation, seems "to be able to provide a path to hearing the migrant voice" -so repeatedly disregarded in the debate on undocumented migration-, and thereby orienting migration policy and law in a more humane and coherent direction.⁸³⁰

The pillar of empowerment also drives us to build horizontal partnerships based on commonalities and create cooperative networks among persons and organizations working on similar issues, some of which have been essential for the legal advancement of women's rights, for instance.⁸³¹ Social actors are not, at least not primarily, the actors entrusted in international law with the political task of protecting human rights; states are, and this is not overlooked or forgotten in the human security reasoning. This argumentation is, however, enriched with underlining agency as a vital component in exercising human rights claims and, more importantly, in creating or strengthening an

⁸²⁷ See by these authors "Feminist Approaches to International Law", in *The American Journal of International Law*, *op. cit.* For a full and in-depth study of international law from a feminist perspective, see the book by the first two authors: Charlesworth, Hilary and Christine Chinkin, *The boundaries of international law: A feminist analysis*, *op. cit.*

⁸²⁸ See for example the publication of the Law in Context Series by Cambridge University Press initiated in 1970 and currently edited by William Twining (University College London) and Christopher McCrudden (Lincoln College, Oxford).

⁸²⁹ Ogata, Sadako, "Empowering people for human security", Presentation at the 56th Annual DPI/NGO Conference, (no date), p. 6, available at <http://www.un.org/dpi/ngosection/annualconfs/56/ogata.pdf>

⁸³⁰ Oberoi, Pia, "Empowering migrants: human security, human rights and policy", *op. cit.*, p. 270.

⁸³¹ See Merry, Sally Engle, *Human Rights and Gender Violence: Translating International Law into Local Justice*, University of Chicago Press, Chicago, 2010.

‘appropriated’ culture of human rights, one assumed and interiorized by the holders of rights and duty-bearers, thus turning human rights into a living phenomenon, beyond their formal legal underpinning.

At the same time, the research has signalled in Chapter I, limitations to the all-encompassing concept of human security, highlighting that to make it actually operational and valuable it is necessary for it to be tied to existing normative frameworks, languages and indicators, such as those developed in international and regional human rights law. It thus builds on existing criticism towards the notion, but does not abandon the human security proposal, rather seeking to revisit it and complement it on the basis of the various insights it has contributed to strengthen or advance in three central identified points: a) its person-centered approach, b) its emphasis on intra-state violence and broader understandings of direct and indirect violence, including violence against women in all its forms; and c) its underlining of socio-economic vulnerabilities as authentic security concerns.

The text also mapped and analysed the methodologies proposed by different fields to measure human security, as well as the quantitative and qualitative criteria formulated on the basis of ‘global governance’ indicators to determine concrete levels of ‘broad’ or ‘narrow’ human security, i.e., from those building more on development indicators or covering a wide array of threats including those of a socio-economic nature; to those reducing the focus mainly to security as related to physical violence; and closing with approaches that adopt an eclectic position measuring elements of both. Thus, ‘objective’ conditions of human security were considered, and proposals were also explored in the arena of measuring ‘subjective’ elements of human security, that is, individual and social perceptions of safety evaluated through methods from the social and political sciences.

By reviewing as well the recent proposals for generating human rights indicators that incorporate normative legal standards, this thesis concluded on the need and the convenience for practical diagnoses of human security to be constructed with a gendered and human rights based-approach at their core. This would mean building from the indicated existing data on development, threats’ assessments and violent conflict -including or creating necessary figures and analysis on violence against women-, but placing as a central pillar of this evaluation the human rights pointers advanced by international human rights bodies (also regional and local if required). Such an exercise could be carried out by integrating, for example, the recently issued *UN OHCHR Guide to Human Rights Indicators*, of November 2012, and moving a step further to develop threshold criteria of ‘risks to rights’ and levels of vulnerability of particular persons or groups that could direct us, for instance, to estimating low, medium or high levels of human (in)security on a context-specific basis, and thus, orient appropriate preventive and protective action in that regard.

In Chapter II the thesis analysed critically how human security related to human rights and some concrete forms in which the elements of human security are reflected in International human rights law and how they link to public international law more generally. The approach of international law to *risk* and *vulnerability*, central elements of human security, was looked at as a general umbrella under which the development of security concerns as related to protection of persons has taken place, particularly through international human rights and refugee law.

Indeed, as that chapter left clear, when human security has been reviewed in its relationship to public international law, it has usually been through its ability to influence conceptions of security

as related to armed conflict and humanitarian law, be it from a Statist position viewed from its internal actions or within international organizations, especially the UN Security Council.⁸³² UNSC Resolutions 1325 and 1820 related to violence against women and girls, and the resulting partnerships built with civil society actors as examined in Chapter III of this thesis, are examples of this impact of human security. At the same time, human security has been presented as a necessary counterbalance to the dangerous dichotomy of rights versus security in a post 9/11 period, in an attempt to humanize security law and policy in a “less brave new world”, to follow Catherine Dauvergne’s terminology.⁸³³

While these debates are all called for, conceiving international law primarily as a “crisis discipline”, relevant primarily for the highest peaks of conflict and under certain reduced conceptualizations of ‘conflict’, is to impoverish its content and potentials. Indeed, if exclusive or excessive focus is placed on the bellicose feature of the world through a reinforcement and consequent perpetuation of a state-based international law and politics, or on the human suffering caused by direct violence and armed conflict -as displayed in the reflection on human security and humanitarian intervention in Chapter I- this prioritization plays out to the detriment of other equally important concerns for international law: the respect and fulfilment of the whole spectrum of human rights, and the widespread gender-based violence, poverty, marginalisation, and discrimination brutally affecting an enormous portion of global population. Concern within this thesis has thus been directed more to what Hilary Charlesworth has termed “the international law of everyday life”.⁸³⁴

At the same time, the thesis has engaged in the study of the legal implications of conditions of structural vulnerability that although constituting authentic ‘crisis’ or ‘emergencies’, because of their severe and critical character, they have become normalized to such an extent that they constitute the ‘everyday’ of the people who experience them. They are not exceptional situations but the rule. The human security-human rights symbiosis thus brings together the ‘everyday’ and the ‘conflict situation’ in a manner that is relevant for international human rights law and, more importantly, that hopefully contributes to jointly constructing mechanisms for the better protection and empowerment of the persons living these conditions.

On the other hand, the relationship between human security and human rights has usually been briefly quoted only as a general and abstract discursive framing, as portrayed in Chapter II. In some of the few and in-depth academic studies of the linkages of human security to international law, and human rights law more particularly, human security has been viewed more as pinned to ‘basic rights’ of life, personal integrity, or liberty or security of the person, or those very closely connected to ‘survival, livelihood and dignity’; that is, even when person-centered it has adopted a more hard-core view of the values and rights incumbent to security.⁸³⁵ Other recent publications share a more holistic understanding of the relationship between human security and human rights law, in a closer approach to that proposed in this thesis, such as vulnerability and its role in human

⁸³² For instance Gowlland-Debbas, Vera, “An Emerging International Public Policy?”, in *From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma*, *op. cit.*, especially pp. 252-256; see also Oberleitner, Gerd, “Human security: a challenge to international law?”, *op. cit.*

⁸³³ Dauvergne, Catherine, *Making People Illegal: What Globalization Means for Migration and Law*, *op. cit.*, pp. 93-98.

⁸³⁴ Charlesworth, Hilary, “International Law: A Discipline of Crisis”, *op. cit.*, pp. 377, 389-392.

⁸³⁵ See for example the analysis above on Von Tigerstrom, Barbara, *Human Security and International Law. Prospects and Problems*, *op. cit.*; and Owada, Hishasi, “Human Security and International Law”, in *From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma*, *op. cit.*, pp. 505-520.

rights law,⁸³⁶ the twin human security pillars of protection and empowerment as related to human rights of women and girls,⁸³⁷ national origin and legal status as risk factors for human rights of non-citizens (comprising migrants, asylum seekers, refugees and stateless persons),⁸³⁸ or directly examine the legal relevance of human security for human rights' framework and practice.⁸³⁹

As examined in Chapter II, some institutional expressions of the human security and human rights relationship at the regional level, however, have taken up this interaction and its implications with a more holistic awareness, such as the EU security strategy at a more general level; and a more detailed approach by African legal human rights instruments and the report on *Citizen Security and Human Rights* by the Inter-American Commission of Human Rights.⁸⁴⁰ These positions opened an initial window for deeper explorations into the concrete legal consequences and possibilities of the human security/human rights synergy. This thesis has thus wished to unleash human security's potential as an avenue for challenging traditional notions of violence and broadening security concerns related to specific human rights or rights of marginalised groups, such as ESC Rights, women's rights and rights of undocumented migrants, though the threshold-based consideration of structural vulnerability that, theoretically and practically (as illustrated particularly with the socio-economic data presented throughout this thesis), may touch upon any human right in a given context.

For the first part of the thesis, concerning the added value of human security to human rights law, it has been argued that human security contributes to make visible risks to human rights that would otherwise remain shadowed. Supplementing this role of *visibilization*, human security has also been signalled as an orienting notion for better understanding the *interconnectedness* in the phenomena of risks posed to human rights enjoyment and to actual human rights' violations. It is true that human rights law already provides for conditions of vulnerability to be examined as affecting an identifiable individual or group's rights. Human security, though, adds value in underlining the contextual, the structural elements that facilitate or present obstacles to human rights enjoyment, even when not connected to a traceable specific group with determined boundaries of membership. Human security contributes as well to recognizing the 'seamless web' of the law, to use Rebecca Cook's terms, in which legal concepts and decisions in seemingly

⁸³⁶ See the works reviewed above: Chapman, Audrey R. and Benjamin Carbonetti, "Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights", in *Human Rights Quarterly*, No. 33, 2011, pp. 682–732. Regarding the regional level, see Möschel, Mathias, "Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?", *op. cit.*, pp. 479–507; Peroni, Lourdes and Alexandra Timmer, "The Ability of Vulnerability in European Human Rights Law", *op. cit.* On the role of both the Inter-American Commission and Court of Human Rights in this field, see González, Felipe, "The Experience of the Inter-American Human Rights System", in *Victoria University Wellington Law Review*, *op. cit.*, p. 118.

⁸³⁷ See Heyzer, Noeleen, "Combating Trafficking in Women and Children. A Gender and Human Rights Framework", in Truong, Thanh-Dam, Saskia Wieringa and Amrita Chhachhi (editors), *Engendering Human Security. Feminist Perspectives*, *op. cit.*

⁸³⁸ See Edwards, Alice and Carla Ferstman (editors), *Human Security and Non-Citizens: Law, Policy and International Affairs*, *op. cit.*

⁸³⁹ See Lester, Eve, "Socio-economic rights, human security and survival migrants: Whose rights? Whose security?", in *Human Security and Non-Citizens: Law, Policy and International Affairs*, *op. cit.*, pp. 314–356.

⁸⁴⁰ The reference to "citizen" security should not be understood to construct a distinction between citizens and non-citizens as related to nationality, national origin, citizenship or immigration status. As the report explains, it alludes to the call for the democratization of security forces such as police and the military held to open citizen scrutiny and accountability to the people, following a human security and human rights based approach, as explicitly signaled by the report. "Citizen security" was thus employed to mark a difference with concepts such as "public security" or "national security", identified with certain features of Latin America's authoritarian or dictatorial past.

unrelated areas can be made to reinforce or confound each other.⁸⁴¹

The human security-human rights framework thus holds normative, methodological, and epistemological implications. It leads us to consider threats to persons and groups that would otherwise remain invisible or marginalised and translate them into considerations of justice and the language of rights; it orients us to asking different questions and approaching them from the angle of structural vulnerability; and it invites us to acquire knowledge through the dialogue with and the empowerment of those who are silenced and those who yearn to be heard, by constructing “an epistemology of the excluded”, as put by Siobhán Mullaly,⁸⁴² or for our effects, an “epistemology of the vulnerable”.

In spelling out the human rights obligations deriving from risk situations, this text has argued for emphasis to be placed on the state’s obligation to carry out primarily actions of *prevention*, as well as actions of *attention* and *mitigation*, against risks and vulnerabilities affecting people’s overall level of security. The obligation of *reparation* under the human security notion should also be underlined, in cases in which the prevention, attention and mitigation failed, and the human rights violations were already produced. Such mechanisms of redress should be proportionate to the risk suffered and the vulnerability unattended, that is, in cases of structural vulnerability, the reparations should be consequently provided for in order to genuinely tend to the *repairing* of the damaged social environment which facilitated the human rights violations and to the *constructing* of collective and institutional conditions that allow for human rights’ respect and protection. This would precisely be the contribution of taking a human security approach to the interpretation of human rights obligations as called for in situations of risk.

It has also been proposed that human security can constitute an *enabling environment* that may work in a dual way, or if one wishes, in a triple manner if we are to consider its ability as a *connecting* conception. First, it is useful for providing criteria to identify risk situations and conditions of structural vulnerability, through what could be termed the *negative sense* of human security, that is, for assessing circumstances as lacking an adequate environment for general well-being and human rights realisation, and therefore activating duties of *prevention* and *protection* and/or *reparation*, as explained above.

I have also argued that human security has a potential to function as an *integrating bridge* between correlated ideas and norms, in this case, those that allow attention to interrelated risks to human rights that place persons in contexts of vulnerability.

Lastly, I propose that the result of looking at the connection between the *core content* of human rights and viewing them integrally may be considered in fact *human security*. Under this light, human security refers not only to the protection from severe threats and risks described in the working understanding in Chapter I, but in a *positive sense*, becomes also a *guarantee* at the collective level, a general condition which is necessary to allow the full enjoyment of all human rights by all persons. In this understanding, human security may act as the modern materialization of the right to an *enabling social and international environment* foreseen in Article 28 of the Universal Declaration of Human Rights (UDHR), and thus complement the individualist basis of

⁸⁴¹ Cook, Rebecca, J., *op. cit.*, p. 106.

⁸⁴² Mullaly, Siobhán, “Attending to method in *Feminist Approaches*”, in *IntLawGrrls. Voices on international law, policy, practice*, Friday 19 October 2012, available at <http://www.intlawgrrls.com/2012/10/attending-to-method-in-feminist.html>

human rights.

The cases studied in the section on risk, vulnerability and international law, as well as the relationship spelled out between ESC Rights, human insecurity and vulnerability to poverty, made evident the need for a stronger and more efficient dialogue between policy-makers, development specialists and the (human rights) legal community, when the vulnerability of populations at risk, such as street children or Roma people, had already been identified and was not adequately dealt with, thus resulting in human rights violations adjudicated internationally. The human security-human rights framework proposed in this thesis may foster such a conversation under a common umbrella that covers these different concerns and confronts them preventively in a timely manner, together with grounding them with a solid normative basis.

Indeed, in the reviewed cases by the ECHR of *D.H. and Others v. Czech Republic* of 2007 and the recent case of *Horváth and Kiss v. Hungary*, of January 2013, the Court found a violation on the basis of article 2 of Protocol No. 1 in conjunction with article 14 of the ECoHR (right to education as related to the right of non-discrimination), affecting Roma children placed in “special schools” on account of a “mild mental disability”. To delve a bit deeper in the most recent case of *Horváth and Kiss*, the Court signaled that the situation had to be seen *in the context of a long history of misplacement of Roma children* in special schools in Hungary and other European countries. While it could be argued that the situation resulting from the applicants being treated differently – the school assessment testing – might have a similar effect on other socially disadvantaged groups, there was nevertheless, at first glance, a case of *indirect discrimination*. The Government therefore had to prove that that difference in treatment had *no disproportionately prejudicial effects*. The Court also concluded that Roma children were often “misdiagnosed because of *socio-economic disadvantage or cultural differences*”. Harmonized with the human security blueprint, the judgment even contains a whole part dedicated to analyzing the “societal context” of the case.

At the Inter-American level it seems the Court has addressed more straightforwardly socio-economic vulnerability, without tackling it only as a matter of (indirect) discrimination. It is true as well that some cases are of such a grave nature, for instance, the death of members of an indigenous community, including children, due to the devastating levels of deprivation and scarcity that they suffered, that they would not merit a less decided response. Indeed, in the case of *Xákmok Kásek v. Paraguay*, in applying threshold criteria and assessing the critical collective situation of “particular vulnerability” and the “structural discrimination” experienced by the indigenous community, the Court explicitly stressed the state’s violation of an obligation to prevent the deaths of some of its members by not having attended the *known risk* on time. In a similar way to *Cotton Field*, it also transported the structural dimension of the violations up to the realm of reparations and it determined as one of the measures of redress that the state take actions to guarantee “food security”, “health security” and water and sanitation infrastructure for the indigenous community within a period of two years, thus building explicitly on the human security language and concept to address collective conditions of vulnerability in the field of human rights law.⁸⁴³

In the similar cases of *Yakye Axa v. Paraguay*, *Sawhoyamaxa v. Paraguay*, *Moiwana v. Suriname*, and *Saramaka People v. Suriname*, involving also indigenous and traditional communities, the Court followed its previous position of recognizing the indigenous conception of collective

⁸⁴³ IACHR, *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, *op. cit.*, paras. 227, 265 and 323.

property and emphasized the state duty of protecting it as a condition for the economic survival of the communities. It stressed as well the risk and “specific” or “acute” vulnerability arising out of extreme poverty, coupled with the membership of persons to indigenous or minority ethnic groups, and interpreted the state’s obligations regarding the rights to life, to personal integrity, and to protective judicial guarantees -in relation with its general obligation to protect persons under its jurisdiction-, to encompass positive obligations to prevent and attenuate risk conditions and to adopt protective measures.

Thus, in the analysis of ESC Rights, the thesis revealed how the human security-human rights interaction goes in line with positions expressed at the regional level, as well as by the UN Committee on ESC Rights. This body, in interpreting the ICESCR, details the circumstances in which a *reversal of the burden of proof* is allowed or even called for. As reviewed above, states are under a legal obligation according to the ICESCR to use the maximum of their available resources to assure rights, privileging the most vulnerable groups and those with the most urgent needs. In this respect, diligence in the adoption of these measures cannot be presumed and states must demonstrate the steps they are taking to prioritize the protection of at least the minimum core of such rights even in time of crisis or resource constraints.⁸⁴⁴ The proximity between the language of ‘minimum core’ of rights used by the Committee and that of the ‘vital core’ of all human lives as proposed by the 2003 human security definition, would point to reinforcing bridges that incorporate the enjoyment of ESC Rights as full security concerns. Indeed, Gerardo Pisarello has considered ESC Rights as freedom rights, borrowing partly from Amartya Sen’s idea of development as freedom, insofar as the lack of their fulfilment in an extreme degree leads to the annulment of freedom. As he has signalled in analysing the Committee’s views, the existence of an asymmetric relationship of subordination and defencelessness between two subjects, individual or collective, authorizes for the reversal of the burden of proof in the case of a presumed violation of a right.⁸⁴⁵ Understanding ESC Rights as freedom rights reveals and reaffirms the importance of prioritizing attention to the most vulnerable persons, who are placed at a higher risk of violation of their human rights. The notion of human security helps to highlight this condition of risk and vulnerability in a way that is relevant for the law, as exposed through the analysis of the above cases.

This text has argued that reflections on socio-economic risks and vulnerabilities from the human security perspective can thus feed into and complement ongoing discussions on the legal obligation to alleviate world poverty as a pressing human rights and global justice concern.⁸⁴⁶ As elaborated in the section on Human security and human rights in Public International Law, human security may prove helpful and even necessary as a bridging conception to shape and unify current debates on the right to development, global justice and the role of the international trading, investment and financial systems, and the involvement of non-State actors, such as transnational and other business corporations, in the field of human rights. Prioritizing critical and widespread

⁸⁴⁴ See article 2.1 of the ICESCR and UN Committee on ESCR, General Comment No. 3 *The nature of States parties obligations* (Art. 2, par.1 of the Covenant), 14 December 1990 (contained in Document E/1991/23), paras. 10-13.

⁸⁴⁵ Pisarello, Gerardo, “Los derechos humanos de los migrantes”, in Añón, María José (editor), *La universalidad de los derechos sociales: el reto de la inmigración*, op. cit., pp. 58 and 70.

⁸⁴⁶ See for example Pogge, Thomas, “Severe Poverty as a Human Rights Violation”, in *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor*, op. cit.; and Salomon, Margot E., “International Human Rights Obligations in Context: Structural Obstacles and the Demands of Global Justice”, in Andreassen, Bard A. and Stephen P. Marks, (editors), *Development as a Human Right: Legal, Political and Economic Dimensions*, op. cit., and by the same author, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, op. cit.

vulnerability as its axis, I argue that human security may indeed act as a centripetal force to bring together several contemporary debates and social movements that share the common concern of appalling material deprivation and marginalization experienced by millions of persons worldwide.

The human security-human rights relationship was examined through looking at some of the main legal intersections between human security and human rights: first, it reviewed how international human rights law has treated security in general through the embodiment of the rights to personal security, social security, security in tenure and food security, and set the stage to ask whether human security is or should be a human right; to fully approach this question, the dialogue between human security and human rights was taken a step further through exploring it in light of the sources of public international law and concluding on human security's potential to be considered, as anticipated above, as a modern materialization of Article 28 of the UNDH that foresees a *facilitating environment* for human rights' realisation.

Thus, the present text has wished to contribute to this discussion shifting the boundaries of international law to address in deeper and more efficient ways the structural and interrelated challenges for human rights enjoyment for all, especially, those placed in situations of vulnerability.

Numerous consequences arise out of the human security-human rights interaction. To address the main ones dealt with in this work, let us recall that one of the flaws of human security often signalled is the lack of accurate criteria for defining the threshold to be met in order to consider an issue a risk situation. The thesis, in addressing such concern, proposes ways in which human rights law may contribute to better defining the precise scope of human security. More importantly, the thesis aims at using this knowledge to reveal and propose ways in which human security is and can be relevant to the law of human rights, and how human rights can inform and deliver a more precise and operational conception of human security. These identified *interpretative synergies* may work together towards enhanced protection of the rights of people in their daily reality, in particular, those who do not only confront isolated moments of risk or human rights violations, but rather those in conditions of structural vulnerability, specifically women and girls suffering or at risk of violence, as analysed in Chapter III, and undocumented migrants and other non-citizens, as reviewed in Chapter IV above.

Indeed, gender and legal status relating to entry into or residence in a given State, both continue to constitute risk factors increasing the possibility for women and girls, and for undocumented migrants, of experiencing human rights violations. The international legal human rights framework applicable to violence against women and to undocumented migrants and their implementation, present gaps which translate into serious lack of protection. Thus, both topics present legal challenges in terms of bringing to life and making effective the human rights of the people (un)covered by such norms. At the factual level, violence against women is still wide-spread and pervasive and apart from constituting a form of discrimination and a human rights violation in itself, it is also an obstacle for the enjoyment of other human rights. The migratory phenomenon is in its own nature transnational and thus relates to human security's concerns for a new paradigm that adequately responds in a coordinated way to situations affecting people and transcending national borders. Undocumented migrants, whether moving across or within national frontiers, because of their status of legal irregularity, are at times placed in a species of 'legal limbo' where their rights are purportedly undefined, they often live in a climate of fear and they confront constant threats or actual violations of their universally recognized rights.

Human security may then act as the ‘missing link’ between the individual and the collective dimension of human rights violations. The stage may not yet be set to conclude there is an individual or a collective right to human security, as part of the debate within the UN does seem to be headed in the case of the current proposals surrounding the right to peace, for instance. International law has so far only advanced collective rights, that is, rights to be exercised by a collective legal person, in limited cases, for example, the right of self-determination of peoples or the rights of indigenous peoples; and foresees the protection of certain groups in particular circumstances (religious, linguistic, ethnic or national minorities, for instance). The analysis of these distinctions is not the focus of this thesis and thus ‘collective’ or ‘structural’ vulnerability has been understood in this text as a conjunction of societal, underlying or systemic conditions that place at risk, affect or harm the enjoyment and fulfillment of all human rights.

What human security can do, as has been demonstrated in this research, is act as the bridge between different collective or societal conditions that threaten individual (or group) human rights, that is, the *structural risks to rights*. These risks, or their compounded combination, may be so critical or severe so as to create a disruptive environment for human rights that facilitates their violation, openly acting against Article 28 of the UDHR. Human security may then function as a heuristic concept to identify circumstances where the State is compelled to take additional measures regarding concrete human rights as foreseen in normative instruments, standards and indicators.

It does not, however, only reinforce the statist dimension of the risks to rights, but actually also carries consequences for the horizontalization or transnationalization of responsibilities. True, there is not even consensus on the level and scope of state responsibility in certain matters of human rights violations within international law. This does not however imply that the need to discuss and think creatively on alternative legal avenues is not urgently called for, as the depicted situations of structural vulnerability of women, girls and undocumented migrants worldwide, among others, make blatantly evident. Indeed, the obligations attached to non-State actors such as persons perpetrating violence against women (VAW), abusive employers, transnational corporations, or regional organizations, become more visible under a human security lens. The conceptual interaction of a gendered human security with human rights renders clear the risks and vulnerabilities affecting persons and groups and calls for a stronger and more protective legal response, as is only starting to be displayed by UN human rights mechanisms such as CEDAW, the UN Committees on ESCR and on the Protection of the Rights of Migrant Workers, as well as regional judicial bodies, as will be detailed below.

This fortunate, although timid and somewhat inconsistent, reply would be much better complemented with a preventive rather than a reactive stand by states and other actors, such as regional organizations, civil society and the business sector, and would serve a critical and mainstreaming function within the UN and regional organizations themselves.

The legal implications of the human security-human rights juxtaposition point at the least to reinforcing State obligations of protection in the context of structural vulnerability regarding their own actions or omissions. It also would orient towards defining state responsibility concerning the actors under its jurisdiction that commit human security-threatening actions or inactions when such situations amount to discrimination or such private parties act with the state’s acquiescence, that is, a determination of responsibility always through the filter of the state.

At the most, the synergies between human security and human rights could eventually lead us, first, to the direct international legal responsibility of such non-state actors. Secondly, a gendered human security-human rights lens also holds relevance for evaluating the political coherence of the state's foreign policy with democratic and human rights standards, and ultimately the possibility of the state's legal responsibility for its actions in this field. The assessment of foreign policy would apply not only to the state's position in formal human rights issues and bodies, but also regarding its stance concerning treaties or activities in other fields actually affecting human rights, for instance, in trade agreements, bilateral or multilateral investment treaties or arbitration procedures. This opens up a path for posing new questions, as will be signaled below in section V.3 on prospective routes for engagement.

The thesis then constructed its proposed framework of analysis by looking more distinctly at the reflection of human security principles in judicial and quasi-judicial decisions, through the human rights bodies at the UN level as well as the European, Inter-American and African systems of human rights.⁸⁴⁷ Evidence indicates that at these three regional levels, as well as their human rights' systems, human security is indeed embedded in different degrees in the historical traditions influencing understandings of security in each of such regional contexts, thus revealing a strong grounding to relate human security to human rights and further advance the legal implications of such linkage in the ways specified in the following concluding section.

V.2 Legal interaction: *interpretative synergies* between human security and human rights

In **PART 2** of this work, the thesis then moved on to apply the general conception of human security discussed in Chapter I, and the human security/human rights framework studied in Chapter II, in relation specifically to two thematic cores under human rights law: violence against women and girls (VAW), on the one hand; and on the other, human rights of non-citizens, in particular, undocumented migrants. The aim was to evaluate the human security framework of analysis proposed throughout this text as applied to two of the most pressing global concerns today.

Of course, these are not the only issues that could be viewed under such a framework and generate innovative legal questions. To name some, global public health, landmines, small arms and weapons, collective security in the UN Security Council and the AU have been analysed under the human security lens.⁸⁴⁸ The two selected thematic cores, though, are jointly representative insofar as both themes, violence against women and violations to human rights of undocumented migrants, enter the realm of structural vulnerabilities which are faced by considerable sectors of

⁸⁴⁷ As to other regional contexts, the thesis makes incidental references to provisions of the Arab Charter of Human Rights when linked to other similar regional provisions under analysis. On the other hand, the very active positions of Japanese diplomacy in the field of human security and its relationship to human development and human rights are also emphasized and coupled with allusions to the existing so-called Asian perspective of human security. It must be noted that ASEAN and the League of Arab States have also engaged in human security activities. However, given that nor the Arab nor the Asian regions have a functioning institutionalized human rights' system in place (despite recent efforts by ASEAN to lift its human rights profile) the thesis concentrated on the human security/human rights intersection regarding the three regional organizational schemes that have developed human rights normative standards and case law relevant to the analysis.

⁸⁴⁸ See for instance the thematic division presented in Von Tigerstrom, Barbara, *Human Security and International Law. Prospects and Problems*, *op. cit.*, and the analysis contained in Chapter II above.

the population. They also find a common denominator in being present in liberal democratic polities holding generally acceptable records in respect for human rights. They are not confined to or limited by armed conflict and the consequent legal order of international humanitarian law. They hold academic value and speak to a broad audience as issues that allow for novel questions for human rights and revisit others under a new light.

The structural vulnerabilities suffered by both women and girls at risk of violence, and undocumented migrants, are analogous in that they confront gaps in international law, in human rights law and/or its implementation that have rendered these tools insufficient in addressing concerns on both topics. These cracks in the system allow for thousands of persons to fall between norms, to remain unprotected and in some cases, to confront life-threatening situations. Threats to human security in the form of socio-economic deprivation, as evidenced in the section of human security and ESC Rights, are a *cross-cutting issue* placing both women and girls facing violence as well as undocumented migrants -often poor and socially marginalized-, in heightened conditions of vulnerability. It is not a coincidence that legal, philosophical, political and sociological scholarship, international and inter-governmental organizations' reports, human rights universal and regional mechanisms and multiple civil society activities have recently centered their radar in prioritizing both issues in their agenda. Thus, the present text analysed whether human rights law has something more to offer in the face of these challenges and, if so, how it may do so effectively in order to deliver some of the promises envisioned by the universalist human rights spirit and the legal architecture constructed around it.

Both themes are dissonant in the fact that although violence against women and girls is still widespread, protection from it has found its way into specific legal instruments and growing public awareness places it in the political debate as a matter of discrimination and thus a violation to equality; undocumented migrants have generally not engaged in -and much less won- the political battle given their clandestine situation, as signalled above in the references by the UN Special Rapporteur on the Human Rights of Migrants, Francois Crépeau. A possible exception to this are some groups of Latin American undocumented migrants, mostly Mexican, in the US that have gained political power and carved out a space for "undocumented citizenship" to present social and legal claims.⁸⁴⁹

At the UN level, the number of ratifications of the only legal instrument with universal aspiration dealing explicitly with undocumented migrants, the UN CRMW, is relatively low, in comparison to CEDAW and the additional regional instruments at the Inter-American, African and European levels that also tackle several forms of violence against women, including psychological and economic harm. Hope is to be found, though, in the recent positions by the UN Committee on the Elimination of Racial Discrimination, which in 2004 interpreted in its General Recommendation No. 30 *Discrimination Against non-Citizens*, that the prohibition of racial discrimination of the ICERD also covered illegitimate distinctions based on immigration status, thus explicitly incorporating undocumented migrants into the scope of protection of the Convention.

The human security paradigm is highly useful for deeper understanding of the rights of both groups, though perhaps for fairly different reasons: for women and girls, half the world's population, it may place light on the myriad forms of violence and discrimination they suffer and thus incorporate the 'missing half' of security conceptions. For undocumented migrants situated in

⁸⁴⁹ See McNevin, Anne, "Undocumented citizens? Shifting grounds of citizenship in Los Angeles", in Nyers, Peter and Kim Rygiel (editors), *Citizenship, Migrant Activism and the Politics of Movement*, op. cit., pp.165-183.

the context of a global and transnational political economy of free (or thinly regulated) movement of goods and services but not of persons, and affected by a strongly Statist discourse and practice of border control, the shift of the security focus from the State to the individual signifies a breadth of fresh air.

Then again, the two themes, violence against women and girls, and violations to the rights of undocumented migrants, re-connect in their presence in and relevance to developed and developing countries, liberal democracies and authoritarian regimes, the context of peace or armed conflict, in different degrees and intensities, but with the common denominator of representing structural vulnerabilities worldwide. Some of the definitions and standards developed by human rights law may contribute to better characterizing these threats as genuine human security concerns. On the other hand, the human security proposal of *freedom from fear, freedom from want and freedom to live in dignity* seems to hold promise in adding value to identifying and addressing such collective vulnerabilities through offering an integrative approach to fill the relevant legal gaps and fulfil the human rights of affected women and girls, and undocumented migrants and other non-citizens in their everyday lives.

The ‘legal limbo’ and the lack of enjoyment of human rights of undocumented migrants, poses legal questions at the conceptual level in terms of the universality of human rights when considered in light of legal status. Other challenges emerge also in the practical sphere, whilst the lack of protection towards undocumented migrants has been aggravated with the economic crises in the US and Europe, together with new interrogations derived from the Arab Spring. The issue of undocumented migration also connects to most countries in the world, whether as sending, transit or host societies, and it has increased in the last ten years, thus requiring to question whether the current legal framework is up to date and adequate to meet the challenges it presents, not less so - and actually primarily so- those related to the protection of the human rights of undocumented migrants themselves. Migrants without documents are placed in a ‘legal limbo’, economically and socially marginalised and politically disempowered. They face critical human insecurities: daily uncertainty, fear of deportability, precarious access to health and housing, and fragile labour conditions. Due to clandestinity they confront numerous difficulties to exercise their right to access to justice when another human right has been violated, thus confronting a double victimization. Indeed, for some, the most important distinction in the contemporary era is the one between those with legal migration status and those without it.⁸⁵⁰ As referred to above, Hannah Arendt’s ‘right to have access to rights’ comes to mind when grasping the legal exclusion and invisibility experienced by undocumented migrants.

Turning in more detail to the first thematic core, in Chapter III, the text looked more closely at the general conception of human security discussed in Chapter I in relation specifically to violence against women and girls and their human rights. It reflected critically on how a gendered human security would have to be shaped.⁸⁵¹ The chapter examined this relationship in the form of an in-

⁸⁵⁰ See Sassen, Saskia, *Losing Control? Sovereignty in an Age of Globalisation*, New York, Columbia University Press, 1996.

⁸⁵¹ It must be recalled that violence against women is conceived as a subcategory of gender-based violence. This last type of violence also covers for example the experiences of male violence against gay men, of violence based on gender by women or men against transgender persons, or of women against women in the absence of their performance of expected gender roles; see the analysis by Leach, Fiona and Sara Humphreys, “Gender violence in schools: taking the ‘girls as victims’ discourse forward”, *op. cit.* However, women and girls “constitute the majority of victims of gender-based violence and men the majority of perpetrators”, as confirmed by data such as the Global Burden of Armed Violence reports referred to in Chapter III above; see Hayes, Ceri, “Tackling violence against

depth thematic study covering the normative landscapes of the UN, the Inter-American, European and African human rights' systems. It also reviewed different cases, narrowing the focus to a deeper analysis of the paradigmatic cases of *Opuz v. Turkey* and *Cotton Field v. Mexico* by the European and Inter-American Courts of Human Rights, respectively, as two cases exemplifying some of the potentials of the human security-human rights symbiosis.

Considering the human security approach to critical risks and vulnerabilities, this chapter explored violence against women as one of the most pervasive and widespread threats worldwide even in well-off and/or democratic societies, otherwise considered 'peaceful'. At the same time, the chapter highlighted how although the concept of violence against women and girls has been strongly developed by international human rights law, it has seldom been taken into account explicitly in human security concerns relating to violence. Thus, in the last part, the chapter examined the consequences of the interaction of applying a human security lens to the legal analysis of violence against women and their human rights, and of including the human rights definition of violence against women within the human security sphere, and fleshed out the added value of this dialogue.

A gendered human security which duly incorporates the legal grounding of the right of women and girls to live free from violence, it has been argued, would confront reasoned criticisms of the notion of human security as being too broad by giving it a more precise delimitation supported by existing normative legal standards in human rights law. At the same time, it would enhance its legitimacy and practical applicability. To consider the concept of violence against women as developed in international human rights law as part of the definition of violence worthy of protection under the human security proposal, would render its scope clearer and duly address one of the most pervasive large-scale threats as a real security concern.

In Chapter IV of this thesis, the existing international human rights law applicable to migrants, in particular undocumented migrants and other non-citizens was analysed, taking the UN standards as a central departing point and reviewing the regional standards on the subject. Let us just recall that in understanding who is an undocumented migrant in the current global context, the data available pointed to their situation not only in developed host States, but also in other developing States which, as was signalled in the text, actually constitute most of the countries receiving the highest percentage of migrants, such as the Middle Eastern countries of Qatar and the United Arab Emirates. As a second step, the chapter then sketched out the interconnections between human security and human rights of undocumented migrant persons, at the empirical level as well as in legal analysis, by viewing legal irregularity as a source of risk. This part also included a particular section on the application of the gendered human security lens as proposed in Chapter III to spell out the particular risks and types of violence faced by undocumented migrant girls and women, as well as the vulnerabilities experienced more specifically by female undocumented migrant domestic workers. Similarly, it reflected on the specific risks confronted by asylum-seekers in a time when economic crisis and mixed flows of migration allow for weakening protection of this group of non-citizens.

women: a worldwide approach", *op. cit.*, p. 2. Therefore, as specified from the start, for the effects of our analysis this text considered gender-based violence in its most frequent understanding as violence against women and girls (VAW) and concentrated on VAW as the most widespread and illustrative form of gender-based violence, and also as a human rights violation which has been dealt with extensively by international human rights law.

More generally, the human security approach contributed to identifying risks to several human rights of undocumented migrants, quite notably that of access to justice. In the last part the text drew the picture of how some of the identified normative tools may be utilized to enhance human rights protection when applied through a human security-based approach. It analysed illustrative quasi-judicial and judicial cases from the UN and regional systems of human rights in order to exemplify how a human security-sensitive perspective could orient human rights interpretation when put to work in practice, as well as the consequences that unfolded when it was overlooked.

From these analysed human security sensitive and non-human security sensitive cases at the end of Chapter IV, it would seem at a first glance that the tendency both in the IACHR and the ECHR has been protective of the rights of undocumented migrants and asylum seekers. Given the higher number of the first type of human security sensitive cases, this might easily be presumed. Taking a closer look, though, at the judicial cases coupled with the EU normative instruments in the field, the low level of ratifications by European countries of the UN CRMW, and the national and local legal, judicial and institutional responses within the US, the EU and Member States, dismissive of the human rights of undocumented migrants, as revealed in the rest of the chapter, the evidence points to a growing racialization of the migration discourse and an eroded regime of protection of the universal human rights of vulnerable migrants and other non-citizens. Reactions by other host or transit States -both regarding the chapter's accounts of 'deaths at the fault line' and that of the situation of migrants once in the territory of the receiving State-, are not more encouraging, such as those in Libya, the Dominican Republic and Mexico, for example.

There are, as well, reasons for hope when extracting lessons from the examined judicial responses. The case of the *Yean and Bosico Girls v. the Dominican Republic*, by the IACHR and the subsequent Inter-American cases of *Emildo Bueno v. Dominican Republic*, pending before the Commission, and those of *Nadege Dorzema et al. ("Guayubín Massacre")* and *Benito Tido Méndez and Others*, both against Dominican Republic and pending before the Court, provide testimonies of the collective harm suffered by undocumented migrant adults and children of Haitian origin. Under a human security-sensitive approach, the cases addressed such conditions of 'structural vulnerability and discrimination' and in *Yean and Bosico* concluded on the State's responsibility in violations to the rights to nationality and to equal protection before the law, to a name and to juridical personality in detriment of the two girls, daughters of undocumented migrants.

The interpretations in the case of *M.S.S. v. Belgium and Greece* by the ECHR extend the scope of the right to be free from torture or ill-treatment and apply the *non refoulment* principle (article 3 ECoHR), to cover conditions of extreme material deprivation, thus constituting an original and promising avenue to render this right more easily justiciable in cases of severe socio-economic precariousness.

In light of the human security blueprint and the global and interrelated challenges it makes visible (for the purpose of these cases: the impact of HIV/AIDS, poverty and the world distribution of migrants and refugees) one would want to see, though, an expansion of ESC Rights as well, such as the right to health, for instance. Had due weight been given in *N. v. UK* to the structural vulnerability caused by having AIDS, and being N. a female undocumented migrant at risk of returning to the struggling country of Uganda, the ECHR would have possibly been driven to reach a different conclusion in the case, and grant N. a much needed protection, similar to the one

it did actually offer in the previous case of *D. v. UK*, involving a foreign male individual from St. Kitts and Nevis affected by HIV/AIDS and at risk of expulsion.

As noted in the Joint Dissenting Opinion by Judges Tulkens, Bonello and Spielmann in *N. v. UK*, both cases were not different in the extreme circumstances they presented and therefore in *N. v. UK*, article 3 should have also been applied to protect N. against the most certain probability of her facing “an early death” in Uganda. It is true that an adequate application of the absolute nature of article 3 would have resulted in concluding that her removal back to Uganda would constitute a violation. However, if the Court is willing to oversee the non-derogable right contained in article 3, as pointed out by the Dissenting Judges in the case, then it is to be hoped for that under a gendered human security lens an integrated interpretation of the right of being protected from the risk of torture or ill-treatment, coupled with the human rights to life and health as related to the rights of equality and non-discrimination, may render diverse outcomes in future cases. Some promising positions seem to allow for such an interpretation, such as *Sufi and Elmi v. the United Kingdom*, where the protective stance was adopted regarding two non-citizens at risk of expulsion to Somalia based on several non-traditional sources of evidence. Indeed, reports from several UN bodies and NGOs were used, some including explicit references to ‘food security’, and even news reports and a map of Somalia constituted sources to found the Court’s assessment of the country’s human rights’ situation and argument in consequence. Further potentials of this type of approaches could be explored regarding other ESC Rights, for instance, having assessed the right to health and environmental rights as interrelated with the beneficial broad understanding of the right to life afforded in the 2004 case of *Onerlydiz v. Turkey* by the ECHR, which involved the explosion of a municipal rubbish tip due to neglect by environmental authorities and resulting in the death of 39 people living in an adjacent irregular settlement.

Turning back to *N. v. UK*, the danger of employing a balancing exercise in relation to the non-derogable right of article 3, as signalled with concern in the Dissenting Opinion of *N. v. UK*, could also be applied to *Nacic and Others v. Sweden*. A human security-sensitive perspective would have pointed to the inadequacy of prioritizing migration policy over the individual rights of the applicants. This policy-rights equilibrium is out of place when dealing with persons in a situation of vulnerability. On the contrary, in such conditions, the human security/human rights symbiosis makes visible the duty to reinforce protection in the context of the “added vulnerability” faced in that case by persons of Roma ethnicity and at the same time suffering mental health problems; a protective interpretation called for in the Partially Dissenting Opinion of this judgment by Judges Spielmann and Power-Forde.

Another observable tendency that is revealed from the examination of the cases is that it would seem that the ECHR has engaged more with cases of asylum seekers as in *M.S.S. v. Belgium and Greece, I.M. v. France, Nacic v. Sweden* and *A.A. v. Sweden* (the two first favourable to the applicants and the two last not finding a violation) and the IACHR has been more open to analysing the conditions of undocumented migrants, first through the AO 18/03 of the IACHR, *Juridical Condition and Rights of Undocumented Migrants*, of 2003, and then through the *Yean and Bosico Girls v. Dominican Republic* in 2005 and the subsequent similar cases pending before the Commission and the Court at the time of writing. This is possibly so due to, among other reasons, the recent harmonization attempts of a common EU migration policy and apparently the resulting deference by the ECHR to individual states in cases involving undocumented migrants that do not enjoy any other overlapping legal status, such as that of asylum seeker.

This pattern of the ECHR would seem to move in the same line of recent cases regarding other non-citizens and even of documented migrants dealt with by the Court. In this respect, the Court has shown variations in its interpretation of the scope of ‘family’ in the protection of family life, the relevance of language and social ties, and the gravity of the individual’s conduct when weighed against the broader need for public order as a legally justified basis for expulsion.⁸⁵² Regarding concretely undocumented migrants, there are a few cases in which the non-citizen was first residing regularly in the country and then denied renewal of his or her residence permit and was thus undocumented when having experienced the alleged violation. As reviewed above, for example, in *Trabelsi v. Germany*, involving a man of Tunisian origin at risk of deportation from Germany and analysed under article 8 of private and family life, the subjective element of human security is revealed in an account included in the judgment describing the applicant’s “lack of perspective and *insecurity* regarding his future fate and right of residence” when confronting the threat of expulsion to Tunisia.⁸⁵³ However, the Court shifted from the protective position adopted in the previous similar case of *Maslov v. Austria*, of 2008, and concluded in 2011 that in *Trabelsi* there had been no violation, seemingly being supportive or at least permissive of the state’s increasingly restrictive immigration policies, in parallel to similar positions adopted in recent years in all of Western Europe. The recent case of *Kiyutin v. Russia* presents however an interesting turn in terms of migrants’ rights and the possibility of suspending or suppressing an expulsion order on the basis of health reasons (although always argued under article 8 of private and family life).⁸⁵⁴

The positions by the ECHR can possibly also be explained in light of the fact that the ECoHR does not include a mirror provision to that of article 13 of ICCPR described above (rights of ‘lawful’ aliens to legal certainty, due process and fair trial when confronting an expulsion decision). The lack of such a provision has left the ECHR somewhat tied by the hands given it confronts obstacles to review generalized situations of risk and actual violations faced by undocumented migrants in the host State, and when they reach the limit situation of an order of expulsion against them or of actually having been expelled, the Court can only verify if a few minimums were observed. However, as accounted for in the thesis, the state’s obligation of protection towards undocumented migrants and non-citizens and the possibility both of the ECHR and the UN HRC for reaffirming it, may and has been constructed under the more general safeguards of the rights to non-discrimination and equality before the law, as well as other general provisions such as the rights to liberty and security of the person and due process of law; understood as universal human rights and applicable to *all* persons in the territory or under the jurisdiction of the State Party.

Turning to the Inter-American context and human mobility, in this case of internally displaced persons, we find a vivid example of the way judicial interpretation can concretize and bring to life the human security/human rights symbiosis addressed in this thesis. In the case of *Sawhoyamaya Indigenous Community v. Paraguay*, of 2006, based on an academic study on human security and human dignity, Judge Cançado Trindade reminded us that “The problem of internally displaced people...is actually a human rights problem. Displaced people are in a *vulnerable situation* precisely because of the fact they are under the jurisdiction of the State...(their own State) that did not adopt enough measures to *avoid* or *prevent* the situation of virtual desertion they came to

⁸⁵² See for example *Dalia v. France*, Application no. 26102/954, judgment of 19 February 1998; *Slivenko et al. v. Latvia*, Application no. 48321/99, judgment of 9 October 2003 (GC); *Maslov v. Austria*, Application no. 1638/03, judgment of 28 May 2008 (GC); *Trabelsi v. Germany*, Application no. 41548/06, judgment of 13 October 2011, (available only in French), para. 23. Emphasis added.

⁸⁵³ ECHR, *Trabelsi v. Germany*, *op.cit.*, para. 23.

⁸⁵⁴ ECHR, *Kiyutin v. Russia*, *op. cit.*

suffer”.⁸⁵⁵

Regarding the threats faced by undocumented migrants and other non-citizens, as an overall conclusion from the analysed case-law, it seems that the principle (and at the same time rule) of due diligence in relation to violence against women, triggered when the State *knew or ought to have known* of a risk situation or an actual violation, could well be exported to the cases of undocumented migrants. This could be applied in order to argue under a human security lens that when the State was aware of the situation of vulnerability of a certain person or group, including when caused by a private actor such as companies or private employers, its duty to prevent and to take measures is activated. This would pertain, as any other human rights norm, to the persons and actors under the State’s jurisdiction or its effective control, and would involve a reinforced obligation of protection towards those experiencing particular vulnerability, such as undocumented migrants. The path still remains open as to how exactly the transnational dimensions of migration could be confronted through a Statist logic as that still prevailing in public international law, and shared by the human rights legal architecture.

It seems, though, that the human security conception with its emphasis on risk factors regardless of the source (State actor or otherwise) and on the transboundary phenomena placing persons at risk, may offer further promising paths to explore its potential as a catalyst for the realisation of human rights in the contemporary world. These risk situations in the least grave scenario translate into *de iure* or *de facto* denial or limitation of access to rights, and in the worst-case scenario, not at all unusual, they amount to ‘humanitarian crises’, ‘life-threatening situations’ or actual harm to physical integrity and loss of life. When we are faced with such critical and widespread cases of life and rights-threatening conditions -indeed authentic structural conditions of vulnerability- then the ethical, political and legal frontiers to migratory norms and policies must be questioned if we wish to maintain a minimum coherence with those essentials of our democratic rule of law and with international human rights law more generally. The pressing question relates to the human cost of borders and to whether, in light of these cases, a justified argument can actually be made for such a cost to be so high.

The vocation of a binding character attached to human rights law would also serve the purpose of placing the human rights of undocumented migrants at the top of the human security agenda. The universality of human rights of migrants, confirmed by the existing international legal framework and the principle of *ius cogens* of equality and non-discrimination, may also be used as a tool for human security to reaffirm the need to address the vulnerabilities faced by undocumented migrants not only as an issue of moral claim but as *an issue of law*. Indeed, the human security of undocumented migrants constitutes a crossing point in which several of the deep-seated roots of liberal democratic societies seem to come into tension: principles and institutions such as equality, citizenship and universal human rights seem to collide with the evidence of discrimination, vulnerability and risk in which people on the move and persons with an irregular migratory status frequently find themselves.

⁸⁵⁵ IACHR, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of March 29, 2006 (Merits, Reparations and Costs), Separate Opinion of Judge A. A. Cançado Trindade, supporting his argument on the work of M. Stavropoulou, “Searching for Human Security and Dignity: Human Rights, Refugees, and the Internally Displaced”, in *The Universal Declaration of Human Rights: Fifty Years and Beyond* (eds. Y. Danieli, E. Stamatopoulou and C.J. Dias), Amityville/N.Y., Baywood Publ. Co., 1999, pages 181-182; at para. 14, footnote 20. Emphasis added.

On the basis of the research on both topics, it is submitted that there are identifiable parallelisms between the analysed normative standards of the regional human rights systems in Africa, Europe and the Americas and, more specifically, between the studied human rights case-law of the European and Inter-American Courts of Human Rights, and the set of concerns posted in the literature around human security, so much so that one wonders whether this may be pure coincidence or whether instead human rights and human security communities are exercising reciprocal influences on each other. What we find are doors being opened for analysis and debate on the *interpretative synergies* that may arise between the concepts of human security and human rights. In particular, and in the light of the mentioned cases, it seems that the human security approach, in placing emphasis on severe threats, situations of risk and structural vulnerabilities that individuals encounter as obstacles to the enjoyment of their most fundamental human rights, underscores some of the insufficiencies of the classical doctrine of individual human rights, while theoretically grounding some of the more interesting and expansive recent evolutions on human rights violations and State responsibility.

The *interpretative synergies* identified in the thesis suggest that the evolution of human rights is moving along these lines, in a parallel and possibly interconnected way with the different uses and debates surrounding human security. Regardless of whether this is being done in an intended or explicit manner, the fact is that both developments are synchronized in adopting a comprehensive view of human rights and human vulnerabilities, which as this thesis suggests, may be and should be usefully taken advantage of for the effective realisation of human rights of women and girls, and of undocumented migrants and other non-citizens in need of protection such as asylum seekers, refugees and stateless persons. The proposed analytical framework could, of course, be extrapolated and enriched to review conditions of vulnerability of other persons, groups and rights at risk. This set of interpretative tools would, however, hopefully constitute the starting point to approach these empirical situations in a human rights-security code that may expand the ways we think about international law.

This thesis proposes that the legal inferences and implications arising from the analysis carried out in Chapters II, III and IV are complementary to such a degree that their comparison produces results of general significance. Based on the examined scholarship, international and regional human rights instruments, and case-law, the potentials of the human security/human rights interaction may be summarized in what the thesis has termed *interpretative synergies* which also refer to some illustrative legal expressions in each point:

Interpretative synergies between human security and human rights

- a) The inadequacy of limiting the understanding of violations of human rights to only those that represent vertical threats to individuals (coming from the state), leaving discrimination and violence from non-state actors (horizontal violence) as belonging out of the sphere of primary human rights concern.

On this point, the cases of *Opuz v. Turkey* and *Cotton Field v. Mexico* give clear evidence of the potentials of having brought violence against women, regardless of its non-state source, into the realm of human rights concern and, thus, within the scope of state responsibility.

- b) The identification of threats to human rights enjoyment in order to establish thresholds and therefore criteria for ‘red alarm’ as a trigger to activate the state’s obligations of prevention and protection in compliance with *due diligence* standards.

The cases of violence against women of *Cotton Field v. Mexico* by the IACHR and *Opuz v. Turkey* by the ECHR are a reflection of the possibilities of rendering the state internationally responsible for the actions of private parties based on the *due diligence standard*, when the state *knew or ought to have known* of such actions that, in this case, amounted to a risk against women or girls. The reliance on this standard by the ECHR to expand the scope of the right to life is also observable, whilst not named as such, in the case of *Oneryildiz v. Turkey* by the ECHR, as well as in the case of *Delgado Páez v. Colombia* by the UN HRC to broaden the understanding of the right to liberty and security of the person, as analysed in the section on international law, risk and vulnerability. The case of *Xákmok Kásek v. Paraguay* by the IACHR also reaffirms the state obligation of prevention when facing a *known risk* that could materialize into human rights violations, in this case of the rights to life and personal integrity due to extreme socio-economic vulnerability.

This thesis has identified legal irregularity of migrants as a source of risk. Thus, the call for safe migratory routes included in General Recommendation No. 26 of CEDAW on *Migrant Women Workers*, reflects this point of the human security-human rights cooperation.

Eventually this obligation of prevention translated into *strengthened protection* could be expanded to cover directly other actors –for the purposes of this thesis, family members or any person or group who poses a threat of violence against women or girls; or abusive employers, companies, recruitment agencies or other actors involved in the migration process.

- c) The insufficiency of understanding the fulfillment of human rights as equivalent to the non-violation of rights and, thus, the need to underline *positive obligations*, that is, active measures by the state, to prevent violations of human rights and to guarantee their realisation.

Such active measures extend also to the realm of *prevention* in order to not only maintain conditions of non-violation, but also to avoid violations from occurring in risk situations and thus creating a human security environment conducive to human rights respect, as analysed with relation to article 28 of the UDHR. This insight also moves beyond a strict negative/positive conception of obligations and rather illustrates the *continuum* of obligations involved in the respect and protection of all human rights.

The various instruments and cases reviewed in the section on risk and vulnerability are paradigmatic in this sense. The IACHR cases of the “*Street Children*” *v. Guatemala* of 1999 and *Xáamok Kásek v. Paraguay* of 2010, as well as those of *D.H. and Others v. Czech Republic* of 2007 and very recently *Horváth and Kiss v. Hungary* of 2013, both by the ECHR, give testimony to this position. Normative instruments like the 2003 Maputo Protocol on the Rights of Women in Africa, also contain steps forward in the creation and

reaffirmation of legally binding obligations in the field of positive measures directed to prevention.

In the broader field of active measures directed to guarantee not only the non-violation but also the realisation of human rights, the cases of *D.H. and Others* as and *Horváth and Kiss* point to more ample consequences of human rights responsibility in the field of designing and implementing national education policies that are respective of human rights standards and ensure equality and non-discrimination.

- d) The need to identify *structural failures* in the protection of human rights standards in a given society and to flesh out both the *substantive* and *procedural* implications that this may have when it comes to general state (or non-state) action, or to deciding concrete allegations of individual human rights violations.

The implications indicated in the previous point include:

1. On the *substantive* front, the possibility to understand that certain conducts with disparate impact on vulnerable groups may also amount to a phenomenon of discrimination and a consequent violation of the rights to equality and non-discrimination.

Here we find General Comment No. 20 on *The Right to Non-Discrimination* by the UN Committee on ESC Rights, as well as the cases of *DH and Others v. Czech Republic* and *Horváth and Kiss v. Hungary* by the ECHR, which concluded a violation of the right to education on the basis of indirect discrimination. The IACHR in *Xamok Kásek v. Paraguay* also derived state responsibility from an unattended situation of ‘structural discrimination’ manifested in conditions of extreme poverty and ‘acute vulnerability’.

On the other hand, *M.S.S. v Belgium and Greece* by the ECHR identified the systemic failures of the EU Dublin regime as affecting impoverished asylum seekers to the point of amounting to a violation of the rights of an absolute nature contained in article 3 (freedom from torture or ill-treatment and the principle of *non refoulement*). The case by the CJEU of *NS and Others v. SSHD*, of 2011, echoed such terms and addressed the issue of “systemic deficiencies” in the asylum process.

The *Guidelines on Extreme Poverty and Human Rights* adopted by the UN Human Rights Council, as well as the positions of the UN Committee on ESC Rights on forced evictions and the right to social security also identify systemic conditions of vulnerability that must be addressed by the state and relevant actors in order to make possible the enjoyment of human rights by the persons affected by such conditions.

The *substantive* implications of this synergy may also point to addressing the structural failures in the protection of human rights once identified, and especially when recognizing systemic vulnerability, through prioritizing a *protective* stance independently of a verifiable phenomenon of state discrimination or direct human rights violations or the full articulation of a specific legal standard requiring state action.

On this point, the 1984 Cartagena Declaration of Refugees at the Inter-American level, is an example of the recognition of the existence of systemic conditions creating

vulnerability, which in that instance motivated a broadening of the definition of ‘refugee’ to cover persons whose “lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”, and thus expanded state obligations of protection.

Transcending the traditional refugee law requirement of individual and personalized risk as the basis for state obligations, this enlarged definition opened the door for effective state safeguard of a great amount of persons in need. While the existence of such structural risk situation in a given national setting -e.g. think of circumstances in the 1980s stemming from private actors that seriously disturbed the public order-, would possibly not have amounted to a human rights violation under traditional standards of state responsibility, the Cartagena Declaration recognized the social and political reality severely harming people’s human rights. Consequently, addressing this reality through what we could call today a human security perspective, it built on existing instruments to advance a state obligation to address such harms –independently of a previous human rights infringement or not by the state. In a parallel to, or possible even before, focusing on the determination of legal responsibility, it prioritized the urgency of a legal tool to cooperatively and effectively protect people. This human security-sensitive position further translates into the generation of reinforced, increased or even new state obligations once ‘soft-law’ instruments such as the Declaration become entrenched in legal practice, as described above regarding the Inter-American standards on refugee protection.

This substantive implication of addressing structural failures in the protection of human rights on a more general basis, independently from state responsibility in individual cases, could be understood today through a broader and more constructive approach concerning state action to formulate laws and public policies -in conjunction with other social actors in participatory processes-, that eliminate the systemic obstacles that hinder human rights’ realization and rather adopt adequate measures for their protection and fulfillment, particularly addressing persons or groups in vulnerable conditions, as is further signaled below in the section on prospective routes.

2. On the *procedural front*, the implications of this synergy may include the need to duly contextualize the cases and to rely on non-traditional sources of evidence -such as reports by UN or regional bodies and human rights mechanisms, national or local human rights institutions, NGOs, reports of country visits or concluding observations on specific countries by relevant human rights bodies- in order to better understand the background conditions of such cases.

These implications may also involve taking into account on a persuasive or authoritative basis sources produced by international legal practice, such as declarations, resolutions or guidelines resulting from UN, regional or inter-State decision-making bodies, when such instruments tackle structural factors affecting human rights and set forth standards or principles to orient State conduct, or that of other relevant actors. Guidelines formulated by academics and civil society actors could also constitute examples of these influential sources, such as the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, and the *Boston Principles on the Economic, Social and Cultural Rights of Noncitizens*, both adopted in 2011, as studied above.

Other non-traditional sources to be considered in human rights interpretation may include expert legal interpretations carried out by UN or regional human rights mechanisms and courts, such as Advisory Opinions or General Comments and Recommendations by UN treaty bodies, as well as jurisprudence from individual cases resolved by UN or regional quasi-judicial bodies, or by judicial bodies different from that issuing the judgment (for instance, through modes of cross-reference and “judicial dialogue”).

As reviewed in detail above, the IACHR referred to a rich array of sources in its AO 18/03, *Juridical Condition and Human Rights of Undocumented Migrants*; the analysed cases on violence against women provide multiple examples in this sense; and the ECHR has accepted non-traditional sources of evidence to evaluate contextual elements of the countries of origin of migrants or asylum seekers, in cases such as *N. v. Finland* and *H.L.R. v. France*, *Sufi and Elmi v. the United Kingdom*, notably in this last one addressing “food security” concerns expressed in UN and NGO reports, and even relying on news reports and including a map of Somalia within the judgment.

Similarly, taking into account existing patterns of conduct in a certain society and the State’s systematic failure to prevent them, Courts may reverse or lighten the *burden of proof* for individual victims in specific cases.

The expressions of this synergy are multiple and varied. The mention of General Comments No. 3, *The nature of State Party obligations* and No. 9 *The domestic application of the Covenant*, by the UN Committee on ESC Rights, is in line here. Under these interpretations of the ICESCR, the burden of proof as to taking adequate and sufficient measures to fulfill the rights of the Covenant guaranteeing non-discrimination, and respecting the principles of progressivity and non-regressivity, falls on the State Party. The burden of proof of non-violation was also required regarding another right, in this case civil and political, the right to be free from torture or ill-treatment, in the case of *Sonko v. Spain* before the UN CAT, and in its procedural aspect, in the case of *B.S. v. Spain*, regarding the duty of investigation into an allegation of ill-treatment by an African woman prostitute in Spain who suffered police harassment.

Another *procedural* implication that comes to the fore by using this lens would involve accepting third-party submissions in the form of *amicus curiae*, for example, in legal proceedings affecting human rights, both before formal human rights bodies, as well as in other international bodies not formally engaged in human rights adjudication but actually impacting the enjoyment of any given human right(s). To give but an illustrative example, think of investment disputes before arbitration bodies that concern human rights, as will be further detailed below in the proposals of prospective routes of engagement.

- e) The need to duly reflect on the *collective harm* (precisely in terms of increased structural vulnerability) that derives from individual violations which contribute to a pattern of systematic violations in generating an insecure environment or vulnerable condition. In connection with this, the need for *systemic redress* through transformative reparations, meaning reparations able to help individual victims but also help subvert previous structures of discrimination prevalent in society.

The most illustrative case in this regard is undoubtedly *Cotton Field v. Mexico* by the IACHR. This judgment also reflects a gendered human security as proposed in this thesis and takes its structural approach all the way to the last step of granting reparations for the individual victims and broader social remedies.⁸⁵⁶

Another highly representative case is *Xámok Kásek v. Paraguay* which explicitly included within its order of reparations to the state the duty to guarantee “food security”, “health security” and water and sanitation infrastructure for the concerned indigenous community within the period of two years. Making explicit the human security/human rights symbiosis that had been at play implicitly in previous cases, the Court in this instance provides a very significant testimony of how the human security lens may work in practice as applied to human rights. First, the conceptual consideration of the Court of a *known risk* to the state, as an element at the center of the human security notion. Secondly, the expansive and integrated interpretation of human rights permeating this case also reached out to the realm of reparations. The violations found involved the rights to equality and non-discrimination and mainly focused on civil and political rights (rights to life, personal integrity and judicial protection). In the reparations part, however, the Court took into consideration the *causal links* between the lack of timely state action regarding the socio-economic vulnerability of the community and the death of some of its members. Consequently, it granted structural and interrelated reparations that also impact on ESC Rights such as food, health and access to water, independently of the findings of specific state responsibility in violating such rights.

Other instances evaluating context beyond individual conditions and recognizing structural vulnerability or discrimination, thus employing a human security-sensitive lens, include AO 18/03 of the IACHR, *Juridical Condition and Rights of Undocumented Migrants*, and the case of *Yean and Bosico Girls v. Dominican Republic*. The ECHR cases of *B.S. v. Spain* and *K.A.B. Spain*, involving African migrants, woman and man, respectively, also reflect consideration of vulnerability as related to gender and socio-economic condition. Similarly, in *Kiyutin v. Russia* the ECHR considered the applicant who was HIV positive as part of a “vulnerable group” and thus, worthy to be protected against expulsion. However, in all these contentious cases, the conclusion on the violation was the final ‘structural’ step and the reparations provided were only individual.

- f) The need to surpass the division or hierarchical placing of human rights and to better conceptualize *all* of them -civil, political, economic, social and cultural- in terms of *interdependence*, for it is the interaction of different deprivations of rights, including denial of legal personality or conditions of poverty and material destitution, which generates the structural situation of vulnerability and human insecurity which call for *reinforced positive obligations* of the State and other parties.

⁸⁵⁶ As noted above, the Court resolved another two cases, also against Mexico, the *Inés Fernández Ortega Case* and the *Valentina Rosendo Cantú Case*, both of 2010. In these sentences, the Court reaffirmed the due diligence standard regarding the protection of women’s and girls’ human rights. Unfortunately, it failed to draw the logical conclusions of its prior doctrine regarding gender sensitive and transformative reparations; see Rubio Marín, Ruth and Clara Sandoval, “Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* judgment”, *op. cit.*, p. 1090.

In line with this synergy is the ICJ Opinion of 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, studied in the section on ESC Rights above, for its reaffirmation that such rights are an essential part of human rights law to be complied with by States, even in the context of armed conflict. Also Advisory Opinion 18/03 of the IACHR, *Juridical Condition and Rights of Undocumented Migrants*, reviewed above, approached the whole spectrum of their human rights on the basis of the *ius cogens* principle of equality and non-discrimination, and viewed such rights directly through the lens of structural vulnerability.

In *Rosendo Cantú v. Mexico*, the case of violence against an indigenous woman, the IACHR explicitly sustained that the due diligence obligation translated into *reinforced obligations of the State*.

- g) To provide a managed expansion of international human rights law, contributing to an integrated and enhanced interpretation towards the protection of human rights.

This protective interpretation of human rights could also refer to the non-derogable elements of rights or their minimum core, as reviewed in the text (see also **Table 5** above). This would not substitute the set of rights to be upheld in each given context, including those of armed conflict, generalized conflict situation or state of emergency. It would, however, allow for consideration of risk situations, particularly structural ones, affecting the core content of *all* human rights –civil, political, economic, social and cultural- which the State *knew* or *ought to have known* about and, consequently, to provide more extensive criteria to trigger its obligations of prevention, attention and/or granting reparations.

An example of this type of interpretation can be found in General Comment No. 29, *States of Emergency (article 4)*, by the UN Human Rights Committee, in which the Committee considered the requirement of court review over the lawfulness of detention to constitute a *non-derogable element* of the right to personal liberty and security, even when this right is not referred to in Article 4 as one of the non-derogable rights in a state of emergency.

In analyzing the non-compliance of the State with *positive obligations* of taking measures directed to *risk prevention and attention*, the proposed framework may provide guidance with regard to the causes of violations of rights, through *actions* or through *omissions*, especially concerning these positive obligations. For instance, in the famous *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, of 2001, regarding State action damaging to the collective property of an indigenous community, the IACHR indicated that according to “the rules of law pertaining to the international responsibility of the State and applicable under International human rights law, *actions or omissions* by any public authority, whatever its hierarchic position, are chargeable to the State”.

- h) The provision of tools to transcend the conceptual danger of viewing *non-citizens*, particularly undocumented migrants, as *non-persons*, and thus reaffirming the universality of all their human rights.

Because migratory law, discourse and policy tends to contribute to the construction of the ‘other’ through the ‘us/them’ dichotomy, this synergy acts as counter-balance to strengthen the theoretical and legal foundation of migrants’ equality in dignity and rights.

It may be concluded from the analysis of the illustrative legal cases that there is a mixed picture which gives way to a critical account and, at the same time, offers reason for hope. Some of the problems addressed, though, are so generalized, critical and severe, that I have proposed that an alternative analytical framework is in place for such beneficial prospects to be materialized. This thesis has argued that human security with its accent on acute and widespread threats, and therefore on the collective dimension of risks, should be seen as a pre-condition and at times a necessary complement for the exercise and enjoyment of individual human rights which, when viewed each one on its own footing, may tell us a somewhat incomplete story of the realities that people are facing on the ground.

Since I already condensed the interpretative synergies of what human security and human rights can do by working together, now a comparison is called for. How would a non-human security case look like and how does it contrast with cases where the human security elements were actually taken into account? The ECHR cases of *N. v. UK* and *Nacic and Others v. Sweden*, analysed in detail at the end of Chapter IV and above, demonstrate how a non-human security sensitive approach resulted in leaving without protection, respectively, a Ugandan HIV-positive woman and a Kosovar family, (one of their members with a mental condition of depression) who had migrated to Sweden in the midst of the ex-Yugoslavia war and was struggling to build a better life, and allowed for their expulsion, to the dismay of the Dissenting Opinions in both cases which signalled their disagreement with the majority's legal interpretation and conclusions.

As a way of recapitulating only some of the normative expressions, as well as certain representative quasi-judicial and judicial analyses of those presented in Chapters III and IV above, and summarized in the proposed *interpretative synergies*, the following **Table 7** presents the central expressions of the human security-human rights legal symbiosis and the cases in which one of those expressions is absent:

**ELEMENTS OF HUMAN SECURITY PRESENT (OR ABSENT)
IN LEGAL INTERPRETATION, QUASI-JUDICIAL AND
JUDICIAL ANALYSIS**

	Obligation to apply due diligence standards (Obligations of prevention/ actively taking measures / reinforced protection), including non-state actors	Considers systemic/ structural risks or vulnerabilities	Reversal of burden of proof on the State	Use of non-traditional evidence (Reports by UN and regional HR mechanisms, NGOs, national or local HR Commissions)	Consideration of material deprivation/ relation to ESCR as a risk of torture or inhuman treatment	Remedies addressing collective measures/ dimensions
Opuz v. Turkey, ECHR, 2009 (VAW)	✓	✓	✓	✓		
Cotton Field v. Mexico, IACHR, 2009 (VAW)	✓	✓	✓	✓		✓
M.S.S. v. Belgium & Greece, ECHR, 2011 (Asylum seeker)	✓	✓ (Qualified)	✓ (Qualified)	✓	✓	
N.S. & others v. SSHD (UK), CJEU, 2011 (Asylum seeker)	✓	✓ (Qualified)	✓ (Qualified)	✓	✓	
I.M. v. France, ECHR, 2012 (Asylum seeker)	✓			✓		✓
N. v. Finland, ECHR, 2005 (Asylum seeker)		✓		✓		
Yean and Bosico Girls v. Dominican Republic, IACHR, 2005 (UN Committee on ESCR, 2010) (Undocumented migrants)	✓		✓			✓
Sonko v. Spain, UNCAT, 2012 (Undocumented migrants)	✓	✓	✓			
Nacic and others v. Sweden, ECHR, 2012 (Undocumented migrants)	X	X	X	✓	X	X (Rejects)
N v. UK, ECHR, 2008 (Undocumented migrant)	X	X	X	✓	X	X (Rejects)
General Comment No. 3, UN Committee on ESCR. The nature of States parties obligations (Art. 2, para.1), 1990	✓		✓			✓
General Comment No. 4, UN Committee on ESCR, The) right to adequate housing) (Art. 11 (1)). Right to Adequate Housing, 1991	✓	✓	✓			✓

V.3 Prospective routes

In the case of this research, concrete ways have been identified in which human security and human rights can be mutually supportive and provide for a language, a fabric, in which human rights legal interpretation can be made to be more protective and integrated in covering interrelated risk factors, and weave linkages between the core contents of the human rights in question concerning each particular situation. Human security also underlines the interdependence and equal hierarchy of all human rights –civil, political, economic, social and cultural- in supporting or undermining the human security of persons and communities, especially those living in conditions of vulnerability.

It can also constitute a tool for *prioritization* that can further elements to assess and evaluate levels of human need and vulnerability and can add value to existing human rights based approaches (HRBA) and indicators of different fields that already deal with such needs (think of development for example, and the importance for HRBA as stressed by Mary Robinson and Philip Alston).⁸⁵⁷

Apart from being consonant with current HRBA, human security seems to also hold potential to provide criteria for resolving situations of *conflicts between rights*. Although the classical human rights' position is that the utmost effort should be carried out for all rights to be protected in a harmonic way, which this text aligns with, it is also true that there are challenges that come up in practice which actually do require privileging one right of a certain person or group above another such right.⁸⁵⁸ This does not lead to establishing an *a priori* list of which rights are more 'fundamental' than others, a position that is not shared in this thesis, as has been argued above. It does not mean either cancelling out completely the second right in the case of conflict: as it has been portrayed above, human rights bodies and literature have affirmed that the core content of each right should always be maintained, even in the case of rights susceptible of temporary suspension or derogation.

However, human rights scholars and lawyers, judges, policy-makers and activists could benefit from relying on richer criteria based on *levels of risk and vulnerability* in the ways suggested in this thesis, to assess what Mary Robinson has also recognized as the need for more defined standards for making adequate differentiations between 'ordinary' human rights circumstances, and life-threatening situations.⁸⁵⁹ Providing criteria doesn't only operate in the case of 'conflicting' rights, but more importantly also for *positive dialogues* between rights, such as facilitating a closer and mutually reinforcing relationship between civil and political, economic, social and cultural rights. In giving their genuine dimension to threats of a socio-economic nature and emphasizing the indivisibility of physical and material survival, human security contributes to also place related rights to such threats in their due hierarchy.

⁸⁵⁷ See the analysis made by Gasper, Des, "Human Rights, Human Needs, Human Development, Human Security: Relationships between Four International 'Human' Discourses", Institute of Social Studies, The Hague, GARNET Working Paper: No 20/07, July 2007, pp. 10 and following. See also the useful comparative overview of current conceptions related to rights, needs and dangers, contained in Table 4, p. 32.

⁸⁵⁸ For analysis of conflicts between rights, see Brems, Eva (editor), *Conflicts between Fundamental Rights*, Intersentia, Antwerp, 2008, particularly De Schutter, Olivier and Françoise Tulkens, "Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution", at pp. 169-216.

⁸⁵⁹ Robinson, Mary, "What Rights Can Add to Good Development Practice", in Alston, Philip and Mary Robinson (editors), *Human Rights and Development: Towards mutual reinforcement*, New York, Oxford University Press, 2005, pp. 25-41.

This task of *criteria provider* would be fulfilled through the concept of risk and vulnerability as a condition for urgent action to protect specific rights of those persons or collectivities in such a situation. When the threat amounts to a *structural vulnerability*, a reinforced obligation of protection by the State is triggered, as the judicial decisions studied in this thesis have recently started to acknowledge. The existence of such a collective threat cannot be easily perceived and documented through human rights standards alone, even when using non-discrimination principles, as human rights in the legal sense focus generally on *individual* rights, on the one hand, and *actual enjoyment*, on the other. Thus, the existence of a *risk situation*, that is, a situation of *potential* violation of the human rights of a *group* of persons with shared characteristics –think of gender, ethnicity, class, religion, national origin or legal status, to name some- becomes a bit vague and difficult to construct. Thus, leaning on the elements provided by the human security concept, opens the door for broader and more protective human rights interpretations that duly consider interconnected conditions of structural vulnerability that place a person or a whole collectivity at risk of experiencing a human rights violation and, in some cases, may conclude that the sole existence of such vulnerability in itself already constitutes a violation, as analysed throughout this thesis.

From the account displayed in the thesis, other conditions have been categorized by scholarship and human rights bodies both as the cause and the consequence of human rights violations. Think of poverty or discrimination, for instance, as reviewed in the text. The empirical evidence addressed and the case-law examined demonstrates how human insecurity, too, plays this double role: it is at the heart of risk situations that lead to the violation of rights, and once such potential harms are concretized they result in further human insecurity. This reinforcing cycle is provoked and perpetuated most notably in the context of underlying structural vulnerability, in some cases constructed by the law itself, more outstandingly in that of undocumented migrants. It can only be broken with an active reaffirmation and implementation of human-rights based policies, laws and judicial decisions. This thesis has raised a voice in favour of such actions to be taken as part of a broader project of building interrelated conditions of human security understood as a facilitating environment to make possible the full realisation of all human rights, a modern materialization of Article 28 of the UDHR. There are of course other valuable initiatives sharing these common objectives. Human security, I have argued, holds the potential of complementing such efforts and debates and of bringing them together under a common language.

To give but an example of how such potentials could work, let us think of the assessment of foreign policy and external action referred to in the previous section through the lens offered by the human security/human rights symbiosis. Such an evaluation would apply not only to the state's position in formal human rights issues and bodies, but also concerning its activity in bilateral or multilateral investment treaties and arbitration procedures, for instance, before the International Center for the Settlement of Investment Disputes (ICSID), and within inter-governmental bodies such as the World Intellectual Property Organization, the World Trade Organization or the International Monetary Fund.⁸⁶⁰ For instance, under a human security sensitive approach, could business corporations involved in the provision of public services such as water or electricity be charged with international legal responsibility in the field of human rights for their actions? Does the state hold a legal obligation to align its actions with human rights principles and norms in the

⁸⁶⁰ For a specific 'human security approach' to international trade and the right to work, see Howse, Robert and Ruti G. Teitel, *Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization*, Dialogue on Globalization, Occasional Paper No. 30, Friedrich-Ebert-Stiftung, Geneva Office, April 2007, at pp. 14-19.

investment or arbitration treaties and procedures it engages in? In both cases, independently of or as a complement to the existence of strict legal obligations or the finding of legally verifiable violations, could we evaluate state or non-state actor conduct or omission *placing rights at risk*, on the one hand, or *disregarding persons or groups in vulnerability* on the other, e.g. women in conditions of discrimination or violence, people in poverty, undocumented migrants? If so, are these actions or abstentions relevant for human rights law?

To give but an illustrative example of the need for this type of evaluation, let us think briefly of the case of *Aguas del Tunari, S.A. v. Bolivia* before ICSID, concerning the provision of water by a Dutch/American transnational corporation in the disadvantaged area of Cochabamba, Bolivia, as a result of a bilateral investment treaty between Bolivia and the Netherlands. Due to the disproportionate rise in prices of water and several problems regarding access to the service, various incidents of popular upheaval took place, and confrontations with police forces resulted in the death of one person and serious social unrest. The corporation presented a claim before ICSID and the case unfolded under a tense climate, accompanied by the refusal by ICSID of granting the request of the NGO Earthjustice to participate in the procedure. After much opposition by Bolivia, the case was terminated through a ‘friendly’ settlement and Bolivia denounced the ICSID Convention in 2007, withdrawing from ICSID’s competence as settlement mechanism.⁸⁶¹

The questions that could be asked from the perspective of the human security/human rights interaction, relate to the *substantive* issues pointed to above in relation to the state’s foreign policy, but to *procedural* aspects as well. For instance, in looking at the concrete development of the litigation, may it be argued that the rejection by ICSID of requested NGO submissions in this case, via *amicus curiae* or other mechanisms of third party participation, was definite or influential to the negative outcome for Bolivia? Whether viewed as a global public good, a resource of public interest or in its legal character as a human right, the fact is that access to water for people living in conditions of poverty in Cochabamba, Bolivia was seriously harmed. By contrast, the legal standing allowed for interested third parties in the procedures before the IACHR was pivotal in the protective argumentation and result offered in *Cotton Field v. Mexico*, as reviewed above.

This line of reflection would thus complement ongoing debate on human rights and transnational corporations, extra-territorial obligations in the field of ESC Rights, or the human rights obligations surrounding extreme poverty, as detailed in preceding reflections.

Human security also adds up to other ‘humanizing’ discourses, such as human rights, human development, and human needs, as Des Gasper notes.⁸⁶² It is submitted that human security can thus serve a certain *mapping function* of diverse fields that are frequently carried out in a disconnected and non-communicated manner, despite being constructed on similar foundations and principles, and holding shared practical implications. One must only recall Alston’s ‘ships passing in the night’ analogy referring to the relationship between human rights and development.⁸⁶³ Thus, human security is not only useful to push for a more humanized security

⁸⁶¹ See *Case of Aguas del Tunari S.A. v. The Republic of Bolivia* (ICSID Case No. ARB/03/02). For a full account, see Thielbörger, Pierre, “The Human Right to Water Versus Investor Rights: Double-Dilemma Or Pseudo-Conflict?”, in Dupuy, Pierre-Marie, Francesco Francioni and Ernst-Ulrich Petersmann (editors), *Human Rights in International Investment Law and Arbitration*, Oxford, Oxford University Press, 2009 (extract taken from edited digital manuscript). (ICSID Case No. ARB/03/02).

⁸⁶² Des Gasper, *op. cit.* p. 30.

⁸⁶³ Alston, Philip, “Ships Passing in the Night: the Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals”, in *Human Rights Quarterly*, *op. cit.*, pp. 755-758.

agenda, opposing or expanding state-centered or reductionist views of security. It is helpful as well as a *working alliance*⁸⁶⁴ between these different humanized discourses and can give way to constructive partnerships with the development and human rights worlds, if not with other fields, such as climate change and environmental protection. Especially in the realm of human rights law these potentials have not been explored much or deeply, whereby this thesis has proposed that one of such added values lies in providing for *interpretative synergies* between human security and human rights analysis that can work for the benefit of both the rights and the security of people.

To further develop these working alliances, I highlight some possible routes. While the thesis touches at many instances on UN, African, European and Inter-American instruments, it reflects a more intense dialogue between the European and Inter-American experiences, partly because of the dominant presence of Latin American cases in the regional human rights system. The research specifically of Chapters I and II reveals how this exchange is usually absent. To give an example, in none of the English language literature in human security did I find a reference to the 1995 Framework Convention on Democratic Security in Central America. Other ‘missing pieces’ of the puzzle could well be signalled regarding Asian or more notably African sources, and this would be a valid criticism. This thesis does, however, wish to start by building one of the necessary bridges to give way to this dialogue, that of the English and Spanish language legal and political scholarship and case-law. Apart from its linguistic importance, a broader political and academic importance is to be considered: the access to ideas and varied intellectual and legal traditions that could signify a richer and deeper exchange regarding questions of international law. Given we confront common challenges, their common confrontation seems in place. Moving beyond the methodological and institutional implications of such an approach, its inherent and functional value would lie in providing further tools for the human security-human rights interaction to be constructed jointly through the experience of at least some representation of the two human rights systems and languages, including the Latin American experience, and thus contribute to configuring a type of ‘second world approach to international law’, if such a feature exists.

On the other hand, the analysis of illustrative cases provided evidence that judicial decisions, even when aligning with human security and human rights standards, arrive late, or as responses to individual cases; they are insufficient to address widespread challenges. Human security helps emphasize the need for *prevention*, a goal that could also be achieved through legal reform and/or public policy. In this sense, the human security-human rights framework can also be policy-prescriptive. Similar potentials have started to be explored and applied in the Latin American and Inter-American context more generally, and constitute an issue for further research.⁸⁶⁵

Under the reviewed light of human security in its positive sense as an *enabling environment for human rights* embodying Article 28 of the UDHR, human security may also contribute to constructing a ‘rule of rights’ complementing and transcending the ‘rule of law’. As this text has

⁸⁶⁴ *Ibid.*, p. 1.

⁸⁶⁵ See for example Vázquez, Daniel and Domitille Delaplace, “Public Policies from a Human Rights Perspective: A Developing Field”, and Abramovich, Víctor, “De las Violaciones Masivas a los Patrones Estructurales: Nuevos Enfoques y Clásicas Tensiones en el Sistema Interamericano de Derechos Humanos”, both in *Sur, Revista Internacional de Derechos Humanos*, *op. cit.* (also available in English); Dulitzky, Ariel, “The Inter-American Human Rights System Fifty Years Later: Time for Changes”, in *Quebec Journal of International Law*, *op. cit.* See also National Human Rights Programs of Mexico and Guatemala mentioned above in section I.5.3 on the ‘working understanding’ of human security; and for a gendered human security/human rights policy, note the example of The Regional Program in Latin America of UNIFEM (today incorporated into UN Women), “Ciudades Seguras: Violencia hacia las Mujeres y Políticas Públicas” (“Safe Cities: Violence Against Women and Public Policies”).

attempted to demonstrate, it is through the protection of human rights, particularly of those most vulnerable, that any political regime, State model or international arrangement, acquires its legitimacy and fosters the greatest possibilities of creating conditions for a peaceful and just social and international order, especially for those most vulnerable, the silenced and marginalised, as Charlesworth, Chinkin and Wright remind us in duly re-locating the priorities of International Law.

To close the circle of this relationship, human security may also contribute to shed light on the discussed threats and fill the gaps of a framework of individual human rights dependent on State action and still heavily reliant on the concept of State sovereignty. At this point, it may not even be desirable for the whole concept of human security, flexible as it is, to become a human right with an autonomous legal foundation -at least in the current dominantly individualistic human rights architecture-, if we wish for human security to retain its power as a unifying, transforming idea, useful to understand in an integrated manner collective and interconnected realities such as the rights-affecting structural vulnerabilities approached in this text.

With the *UN Secretary General's Second Report on Human Security*, presented to the UN General Assembly in April, 2012, and the agreement by this last body in October 2012 on the 'common understanding' of human security proposed in the Report, an interesting window of opportunity is opened, a momentum which should not be wasted or overlooked.

I have argued that in this ongoing debate legal scholarship should be present and add a voice to a dialogue which touches at the heart of human rights advancement and the protection of people in all societies, developed and developing alike, in particular the most vulnerable, so many of whom still await for a humane answer from international law. Through a gendered human security and by deepening the potentials of the human security-human rights symbiosis, international law may well complement current person-centered efforts and offer alternative ways to confront and alleviate severe and critical vulnerability and human suffering. In taking issues of everyday structural injustice seriously, international law might acquire the human face so many persons desperately call for.

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Acronyms and Abbreviations:

ACHPR – African Charter on Human and People’s Rights

ACoHR – American Convention of Human Rights

ASEAN – Association of Southeast Asian Nations

AU – African Union

CEDAW - Convention on the Elimination of Discrimination Against Women

CJEU – Court of Justice of the European Union

CHS – Commission on Human Security (body of independent experts author of the 2003 report *Human Security Now*)

CRMW - International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

ECHR – European Court of Human Rights

ECohR – European Convention of Human Rights and Fundamental Freedoms

ECOWAS - Economic Community of West African States

ESC Rights – Economic, Social and Cultural Rights

EU – European Union

HRW – Human Rights Watch

IACHR – Inter-American Court of Human Rights

IACoHR – Inter-American Commission of Human Rights

IHL – International Humanitarian Law

IHRL – International Human Rights Law

ICERD - International Covenant on the Elimination of Racial Discrimination

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICJ – International Court of Justice

OAS – Organization of American States

OCHA – Office for the Coordination of Humanitarian Affairs (UN)

OECD – Organization for Economic Cooperation and Development

OSCE – Organization for Security and Cooperation in Europe

PICUM – Platform for International Cooperation on Undocumented Migrants

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNDP – United Nations Development Program

UNGA – United Nations General Assembly

UNHCHR – United Nations High Commissioner for Refugees

UNSC – United Nations Security Council

UNSG – United Nations Secretary General

UNTFHS – United Nations Trust Fund for Human Security

UN CAT – UN Committee Against Torture

UN Committee of CEDAW – United Nations Committee on the Elimination of Discrimination Against Women

UN Committee on ERD – United Nations Committee on the Elimination of Racial Discrimination

UN Committee for ESC Rights – United Nations Committee for Economic, Social and Cultural Rights

UN Committee on RMW – United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of their Families

UN CRPD – United Nations Convention on the Rights of Persons with Disabilities

UN HRC – United Nations Human Rights Committee

UN OCHA – United Nations Office for the Coordination of Humanitarian Affairs

UN OHCHR – United Nations Office of the High Commissioner for Human Rights (also as OHCHR)

VAW – Violence against women